IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

STEVE SHELTON, Petitioner, v. ROBERT E. SNYDER, WARDEN DELAWARE CORRECTIONAL CENTER, Respondent.	)	Civ. No. 00-78-SLR

Michael W. Modica, Esquire, Wilmington, Delaware and Thomas Pederson, Esquire, Wilmington, Delaware. Counsel for Petitioner.

Loren C. Meyers, Esquire, and Thomas E. Brown, Esquire, Department of Justice, Wilmington, Delaware. Counsel for Respondents.

OPINION

Dated: March 31, 2004
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

On January 21, 1992, Steven W. Shelton ("petitioner") and two co-defendants, Nelson W. Shelton ("Nelson") and Jack Foster Outten ("Outten"), were indicted for first-degree intentional murder, first-degree felony murder, first-degree conspiracy, first-degree robbery, and possession of a deadly weapon during the commission of a felony. All three were tried before the same jury in the Delaware Superior Court in and for New Castle County and, on February 24, 1993, were found guilty as to all counts of the indictment after a five week jury trial. In a separate penalty hearing, the jury recommended that petitioner, Nelson and Outten be sentenced to death. The Superior Court accepted this recommendation and sentenced all three defendants on April 30, 1993 to death by lethal injection.[1]

Petitioner filed a pro se application for writ of habeas corpus on February 7, 2000 (D.I. 3), a motion to stay the state court proceedings pursuant to 28 U.S.C. § 2251 (D.I. 4), and a motion to proceed in forma pauperis. (D.I. 2) Petitioner moved for appointment of counsel. (D.I. 5, 12) On February 14, 2000, the Attorney General ("respondent") answered petitioner's motion

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[1]Nelson Shelton voluntarily dismissed his appeal from the convictions. The Delaware Supreme Court affirmed his sentenced pursuant to 11 Del. C. § 4209(g)(2). Nelson declined to pursue further appeals and post-conviction relief. State v. Shelton, 1997 WL 855718 (Del. Super. 1997). He was executed by lethal injection on March 17, 1995. Shelton v. State, 652 A.2d 1 (1995).

for a stay. (D.I. 7) The court granted a stay of execution and petitioner's motion to proceed in forma pauperis on February 23, 2000. (D.I. 8) On April 3, 2000, the court granted petitioner's motion for appointment of counsel and ordered respondent to file his answer. (D.I. 13) Petitioner moved, on June 30, 2000, for leave to conduct an evidentiary hearing. (D.I. 16) After briefing (D.I. 21, 25, 27) and argument (D.I. 26), the court stayed consideration of petitioner's motion pending a decision by the Third Circuit Court of Appeals in Riley v. Taylor, No. 98-9009. (D.I. 28)

On March 28, 2002, the court denied petitioner's motion for an evidentiary hearing. (D.I. 30) On April 11, 2002, the court granted petitioner leave to amend his application for federal habeas relief to include a claim of ineffective assistance of counsel related to the preparation, cross-examination and investigation of the prosecution's primary witness against petitioner and his co-defendants. (D.I. 31, 32, 33) The evidentiary hearing on this issue was held on June 25 to 26, 2002.

On September 17, 2002, the court stayed further action in the case pending a decision by the Delaware Supreme Court concerning the impact of the United States Supreme Court decision, Ring v. Arizona, 536 U.S. 584 (2002), on the Delaware

Death Penalty Statute.[2] (D.I. 40) The Delaware Supreme Court addressed these issues in its Brice v. State and Garden v. State decisions issued, respectively, on January 13, 2003 and January 24, 2003. Pursuant to notification by the parties of these decisions, the court arranged a status conference with the parties on April 4, 2003. (D.I. 42) Petitioner moved for leave to file an amended petition to add claims under Ring on April 17, 2003. (D.I. 44) After granting extensions of time for both parties (D.I. 45, 49, 51), petitioner's amended application for a writ of habeas corpus became ripe for review on September 29, 2003. (D.I. 52) For the reasons that follow, the court denies the requested relief.

II. BACKGROUND[3]

A. The Murder to Wilson Mannon

[2]The Delaware Death Penalty Statute was amended in 2002 following the Ring decision. The Brice decision focused on the constitutionality of the amended version of the Delaware Death Penalty Statute.

[3]The court draws the following factual background from a number of sources: 1) the Delaware Supreme Court decision regarding petitioner and Outten's automatic appeal, Shelton v. State, 650 A.2d 1291 (Del. 1994)("Shelton I"); 2) the Delaware Superior Court's decision on post-conviction relief, State v. Shelton, 1997 WL 855718 (Del. Super. 1997)("Shelton II"); 3) the Delaware Supreme Court's decision on post-conviction relief, Shelton v. State, 744 A.2d 465 (Del. 2000)("Shelton III"); 4) the court's memorandum opinion (D.I. 29); 5) the court's independent review of the record of the state court proceedings; and 6) the parties' instant briefs. (D.I. 47, 48, 50, 52)

On January 11, 1992, petitioner, Nelson, Outten and Christine Gibbons spent the afternoon drinking beer at Gibbons' home in Newark, Delaware. The Sheltons are brothers, and Outten is their cousin. Gibbons was Nelson's girlfriend. Outten purchased the beer using his unemployment check.

At dusk after drinking approximately one and one-half cases of beer, the four drove in Nelson's two-door Camero to Clemente's Bus Stop, a local tavern located on U.S. Routes 13 and 40 in Wilmington, Delaware. On the way to the bar, they discussed a plan for Gibbons to pose as a prostitute and lure men out of the bar. Petitioner, Outten and Nelson planned to rob the men once outside.

After arriving at Clemente's, the four continued to drink beer. A patron came over to the four and spoke with Outten about buying drugs. Outten told the patron that he could obtain drugs for him. At this point, the four left Clemente's with the patron and drove to a building in Stanton where Nelson formerly worked. Outten and the patron exited the car and walked behind the building. Outten returned with twenty five dollars in cash that he took from the patron.

The four then drove to Hamil's Pub in Elsmere where Outten used the money to buy more alcoholic drinks for the group. Nelson and Gibbons argued at Hamil's Pub because, according to Gibbons, Nelson was jealous that she danced with Outten and

petitioner. Gibbons testified that Nelson punched her in the stomach during the course of their argument.

From Hamil's Pub, Outten suggested going to another bar known as Fat Boys or the Green Door in New Castle. Gibbons testified that she continued to argue with Nelson in the parking lot of the Green Door while Outten and petitioner entered the bar. Eventually, Gibbons went inside and sat at the bar. She initiated a conversation with sixty-two year old Wilson "Willie" Mannon, the murder victim. Mannon was wearing a baseball hat and several pieces of gold jewelry. He was also drinking heavily. Mannon bought drinks for Gibbons and danced with her. Meanwhile, petitioner, Nelson and Outten played pool.

Between midnight and 1:00 a.m., a barmaid observed Outten make a telephone call. Outten telephoned Karen Julian, his girlfriend, and asked her to pick him up from the Green Door. Outten said that he did not want to go with the others. Julian refused.

Around the time of "last call," petitioner, Nelson and Outten joined Mannon and Gibbons. According to Gibbons, Mannon had run out of money, but the group was served a final round of drinks anyway. After the bar closed at 1:00 a.m., Gibbons left with Mannon followed by the three defendants. Mannon talked with the four in the parking lot and then left with them in the

Camero. Gibbons sat in the front seat with Nelson. Petitioner, Outten, and Mannon rode in the back seat.

Nelson initially drove to an isolated spot on East Seventh Street in Wilmington, but ended up on a desolate stretch of Plant Street also in Wilmington. Mannon's body was discovered there on the morning of January 12, 1992 at approximately 11:00 a.m. Mannon was lying on his back with his legs crossed. The top of his head was completely smashed. Blood, brains, and skull matter were lying around his head. Mannon's wallet was empty. Loose change was found near the body, and identification cards were scattered on the ground. A broken ballpeen hammer was found a few feet from the body. The head of the hammer was located on the far side of a nearby fence.

B. Gibbons Contradictory Statements

Over the course of the investigation and trial, Gibbons gave multiple accounts of the events leading to Mannon's murder. On the morning of January 12, 1992, Nelson and Gibbons were stopped by the New Castle County Police and taken to police headquarters. The County Police sought to question Nelson on a charge unrelated to the incident involving Mannon. The County Police also questioned Gibbons.[4] Thinking that she had been picked up in connection with Mannon's murder, Gibbons spoke about the events

[4]County Police videotaped its interview with Gibbons. This videotape was played for the jury at trial.

of the previous night. Gibbons said that petitioner and Outten kicked Mannon, but was adamant that Nelson was not involved. Gibbons also told police about a sink-like object that was used to hit Mannon and that such object had been later discarded along Interstate 95 after the murder. She informed the County Police that Mannon had been decapitated. Near the end of the interview, the County Police became aware that the Wilmington Police had found Mannon's body.

After a break from County Police questioning, Gibbons was interviewed by Wilmington Police detectives.[5] Gibbons told Wilmington Police that she had been at the Green Door where she met Mannon. She said that Mannon bought drinks for her. Gibbons said that she saw Mannon leave the bar after her and that Outten invited him to join them. Mannon got into the back seat of Nelson's car and left with them. In the area near the Up and Creek Bar, Mannon got out or was dragged out of the car. Gibbons stated that Outten hit Mannon with a hammer and petitioner kicked him. Outten then picked up a kitchen sink and hit Mannon on the head about twenty times. Gibbons insisted that Nelson did not participate in the murder. After leaving the murder scene, she explained that Nelson stopped the car and "they" removed the sink from the trunk and threw it along Interstate 95. Gibbons said

[5]Wilmington Police also videotaped its interview with Gibbons. This videotape was likewise played for the jury at trial.

that the sink, when disposed, may have had brain tissue adhered to it from Mannon's head. She informed the Wilmington Police that the four returned to her house, showered, and washed their clothes and shoes with bleach. She stated that Julian arrived to pick up petitioner and Outten. Nelson cleaned the inside of the Camero with a wash cloth, which he later discarded. Gibbons claimed that she attempted to call a friend to tell her about the events. She said that Nelson discovered her call, became angry, ripped the telephone from the wall, and hit her. She said that Nelson took her to Outten's house to be watched by Outten and Julian.[6]

On January 13, 1992, a day after the murder, Gibbons contacted her social worker, Sandra Nyce. Gibbons told Nyce that all three defendants took turns hitting Mannon and that the men laughed about it as if it were a joke.

In October 1992, Gibbons submitted to a videotaped deposition to preserve her statements for trial. Gibbons testified that petitioner became ill while the group drove from the Green Door with Mannon. She said that Nelson, however, refused to stop the car. After arriving at the murder site, she stated that petitioner went to some bushes to "get sick." At the

[6]After leaving Gibbons with Outten and Julian, Nelson raped an 85-year old woman. He also tied up the victim's son, who was around 60-years old, and searched the victim's purse. Gibbons, however, did not learn of the rape until after her statements to both the County and Wilmington Police.

same time, she said that Outten and Nelson shoved and hit Mannon. She insisted that she asked them to leave Mannon alone, but that Nelson reached into the car and told her to shut up. She said that Nelson also retrieved a ballpeen hammer and used it to strike Mannon on the back of the head causing him to fall. When he fell, he tripped Nelson causing the hammer to fall and break. She testified that Nelson then stood and repeatedly instructed Outten to "finish it." Outten picked up a sink-shaped object from the side of the road and struck Mannon approximately ten times between his nose and the top of his head. Gibbons testified that petitioner returned from the woods and nudged Mannon to see if he were alive. Nelson removed Mannon's rings. Petitioner, Outten and Nelson then passed around Mannon's wallet. Gibbons testified that Outten and Nelson put the sink-like object in the trunk of the Camero. Gibbons stated that Nelson stopped the car in route to her home, and Outten removed the sink and threw it along Interstate 95. The four showered at her house, washed their clothes, and bleached their shoes. Nelson cleaned the car. Outten put on a pair of Gibbons's Harvard sweat shorts, and petitioner wore a pair of her sweat pants. About 3:00 or 4:00 a.m., petitioner and Outten wanted to leave Gibbons's house and needed a ride. They called Julian, and she came to transport them. Gibbons claimed that she blamed petitioner, instead of Nelson, at County Police headquarters on January 12th because she

loved and feared Nelson. In this regard, Gibbons revealed that she was five to six months pregnant at the time of the murder and that Nelson was the father. She further stated that Nelson had raped her on a prior occasion.

On February 19, 1992, Gibbons visited petitioner's lawyer, John Willard, at his office.[7] She implicated Nelson in place of Steven as a participant in Mannon's murder. She also claimed that petitioner fathered the baby that she had since aborted.[8] She said that she engaged in a one-night stand with petitioner and that Nelson was seeing other women besides her during their relationship. She told petitioner's counsel that she implicated petitioner in her earlier statements because she was afraid of Nelson and that he threatened to rape and kill her if she talked about the murder.

During her initial appearance at trial in January 1993, Gibbons testified consistent with her October 1992 deposition, incriminating only Outten and Nelson in the murder. After completing her testimony, Gibbons subsequently asked to retake the witness stand because she claimed that she lied during her previous testimony. The trial court permitted her to recant any

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[7]Mr. Willard taped his conversation with Gibbons. The tape was played for the jury at trial.

[8]On a separate occasion, Gibbons reported that she lost the baby due to the beating she sustained from Nelson on the night of the murder. Outten v. Snyder, Civ. No. 98-785-SLR. (D.I. 57 at A-215)

prior testimony. Her new testimony mirrored her prior one, except that she implicated petitioner directly in the beating. She testified that "they all three started beating on him" and that she saw petitioner kick and punch Mannon in the face. Gibbons stated that she gave a different version of the events earlier at trial because she was confused about her personal feelings toward the Sheltons. Gibbons also stated that she initially told police that Nelson was not involved because she cared for him and that he told her to testify that he was not involved in the murder. Additionally, she said that petitioner told her to say he had gone into the woods at the time of the murder. Gibbons explained that she sought to correct her testimony because it was unfair to blame only Outten and Nelson when Steven Shelton actually also participated in the murder.

C. Petitioner's Penalty Hearing[9]

The penalty hearing was held on March 3 to 5, 1993. At the opening, counsel for both petitioner and Outten made opening statements. Petitioner's counsel stated that his client instructed him not to beg for his life. Outten's counsel told the jury its decision was simple – life or death. He also stated

[9]Petitioner, Nelson and Outten were brought before the jury in the same penalty hearing. The court does not include that portion of the proceeding pertaining to Nelson since it is not relevant to issues in the petition at bar.

that he and co-counsel were "here to beg for the life our clients."

The State proceeded to present evidence and witnesses concerning petitioner's and Outten's past criminal history. For petitioner, evidence was introduced about his robbery and rape convictions, assault of a fellow inmate while incarcerated on the rape conviction, and arrests for driving under the influence and for robbery in the first degree. The evidence against Outten included his house burglary conviction; seven convictions for non-violent crimes including forgery, issuing bad checks, a misdemeanor theft, a felony theft, and criminal impersonation; his family court record; and his probation violations.

Thereafter, petitioner and Outten opted to present mitigation evidence to the jury. Proceeding first, Outten called his mother, two sisters, brother, friend, and Julian to testify on his behalf. Several of these witnesses explained Outten's tumultuous relationship with his father. His father was beaten during a 1974 robbery and suffered communications problems as a result. They stated that Outten was abused by his father as a child, but that he later cared for his father until his death. Julian also explained the impact of their infant's death on Outten. His mother described some of his criminal activity, including an assault on his sister.

In allocution, Outten began by telling the jury that he was twenty-six years old and that he desired to be truthful in his statements to them. He described his childhood as a close-knit family, but claimed that he was "semi-abused." He stated that his father was not affectionate, was abusive when drunk, and "chastened" him, causing him to run away. He explained that he lived in foster care, but left when he was accused of stealing from his foster family. He also reviewed his criminal record, describing himself as "mischievous." He noted that his record covered seventeen pages and 146 charges, but that many of the charges did not result in convictions. He also pointed out to the jury that his convictions were for non-violent offenses. Outten stated that he started drinking as a teenager and then turned to drugs at age twenty to conceal his problems. He also said that he has always been a kleptomaniac. He discussed learning carpentry as a trade in ninth grade and quitting school after his junior year in high school. He said that he continued his education while incarcerated and had a regular roofing job. He started his own roofing company to work on weekends. Outten admitted, however, that he stole to buy the tools for his company. Outten next stated that he had appeared before a judge in Superior Court shortly before Mannon's murder because he had been expelled from a drug treatment program. He told the judge that he was not in the program to become a snitch. Outten

further described his relationship with Julian, how they met, and the events surrounding his first child's death. He talked about his second child with Julian and that it hurt not to be able to hold him and spend time with him. He expressed the desire to watch his second child grow. Outten spoke about his father and the help he gave to him on his deathbed. Finally, he closed by describing himself as full of caring, sharing, honesty, and love, not as cold, calculating, ruthless, or heartless. He professed that his good qualities outweighed his bad ones and asked the jury to give him "the benefit of the doubt" and to distinguish "right from wrong."

After Outten concluded, petitioner called his older half-brother and two half-sisters as witnesses. They described petitioner's difficult childhood and family structure. There were eleven children in the household: five from petitioner's father's first marriage, four from petitioner's mother's previous marriage and then born into this merged family were petitioner and Nelson. Shortly before petitioner's father and mother married, his father suffered a serious work related accident that caused him to lose both legs. Nevertheless, his father continued to work at a boat yard to support the family. His father also drank heavily and physically abused petitioner as well as the other children.

One half-sister testified that when petitioner was ten or eleven, he would have to go to bars in the middle of the night, even on week nights during the school year, to bring their father home in his wheelchair. She also shared that their father took Steven to work with him, drank at the boat yard, and became so intoxicated that he was not aware that petitioner, who was significantly underage, drank with him. His other half-sister stated that petitioner was close with her children and showed them much affection. She also described him as strong, consistent, and responsible. In this regard, she stated that he assisted another sibling with home repairs and helped his mother pay her bills. Petitioner then allocuted to the jury. Shelton II, 1997 WL 855718 at *25-26.

In accordance with the sentencing procedure prescribed in the Delaware Death Penalty Statute in effect at the time of the penalty hearing for first-degree murder, 11 Del. C. § 4204, enacted on November 1, 1991, the jury unanimously decided that the evidence showed beyond a reasonable doubt the existence of three statutory aggravating circumstances: (1) the murder was committed during a robbery; (2) the murder was committed for pecuniary gain; and (3) the victim was more than sixty-two years old. See 11 Del. C. § 4209(e)(1)(j), (o), (r) (1991). By a vote of 8 to 4 as to petitioner and 7 to 5 as to Outten, the jury found by a preponderance of the evidence that the statutory and

non-statutory aggravating circumstances found to exist outweighed the mitigating circumstances presented by petitioner and Outten. Accordingly, the jury recommended a death sentence for both petitioner and Outten. After considering the jury's recommendation, the judge independently found that the prosecution had established beyond a reasonable doubt the existence of three statutory aggravating circumstances. The judge likewise independently concluded that the aggravating circumstances outweighed the mitigating circumstances and, on April 30, 1993, sentenced both petitioner and Outten to death for Mannon's murder.

D. Petitioner's Automatic Appeal

On automatic appeal pursuant to 11 Del. C. § 4209(g), petitioner challenged his conviction on six grounds: (1) the State negligently failed to secure and preserve a washing machine top allegedly used in the murder; (2) the Superior Court erred by not finding Christina Gibbons to be an incompetent witness; (3) the Superior Court erred by failing to instruct the jury regarding the burden of proof for non-statutory aggravating circumstances; (4) the Superior Court erred by excluding the testimony of Anthony Borsello; (5) the Superior Court erred by failing to sever the trials; and (6) the State's peremptory challenge of a certain venire member violated Batson v. Kentucky, 476 U.S. 79 (1976). Shelton I, 650 A.2d 1293. After reviewing

the record and applicable authorities, the Delaware Supreme Court affirmed both the conviction and sentence for petitioner and Outten on December 23, 1994. Id.

E. Petitioner's State Post-Conviction Proceedings

In 1995, pursuant to Superior Court Criminal Rule 61, petitioner filed a motion for post-conviction relief with the Delaware Superior Court. Shelton II, 1997 WL 855718. He alleged several claims related to Gibbons: 1) prosecutors intimidated her into returning to the stand; 2) trial counsel was ineffective for failing to question Gibbons in the presence of the jury as to her reasons for returning to testify; 3) she was intoxicated when she testified the first time. Id. at *27. His other claims challenged the effectiveness of counsel at the penalty phase because his attorney did not move for a separate hearing. He asserted that the Superior Court wrongfully restricted his right of allocution and that his trial and appellate counsel were ineffective by failing to object and raise the issue.

Following an extensive review of petitioner's claims and the evidence[10] submitted in support thereof, the Superior Court denied petitioner's request for a hearing and denied petitioner's request for post-conviction relief. Id. at *75-76.

[10]The Superior Court's examination of the record is copious; on the issue of ineffective assistance of counsel at the penalty phase, the court devotes 56 pages of analysis. See Shelton II, 1997 WL 855718.

F. Petitioner's Appeal of the State Post Conviction Proceedings

Petitioner challenged the Superior Court's decision before the Delaware Supreme Court. Shelton III, 744 A.2d 465. Petitioner asserted various claims "centering around the basic argument that he was the victim of ineffective assistance of counsel at trial and on the direct appeal." Id. at 472. On first impression before the Delaware Supreme Court was petitioner's claim that the trial court wrongfully limited his right of allocution to the jury during the penalty phase. Finding that petitioner had failed to demonstrate that the Superior Court committed any error of law or abused its discretion, the Supreme Court affirmed and remanded for the purpose of setting a new execution date. Id. at 511. On February 3, 2000, the Superior Court reinstated the death sentence and set the date of execution for March 3, 2000. (D.I. 25)

III. STANDARD OF REVIEW

A. Exhaustion

Before seeking habeas relief from a federal court, a petitioner in state custody pursuant to a state court judgment must satisfy the procedural requirements contained in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). This section states:

> An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –
> (A) the applicant has exhausted the remedies available in the courts of the State; or
> (B)(I) there is an absence of available State corrective process; or
> (B)(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). Grounded on principles of comity, the requirement of exhaustion of state court remedies ensures that state courts have the initial opportunity to review federal constitutional challenges to state convictions. Werts v. Vaughn, 228 F.3d 178, 192 (3d Cir. 2000). If a § 2254 petition includes any unexhausted claims, it "must be dismissed without prejudice for failure to exhaust all state created remedies." Sullivan v. State, 1998 WL 231264, *14 (D. Del. 1998)(quoting Doctor v. Walters, 96 F.3d 675, 678 (3d Cir. 1996)).

To satisfy the exhaustion requirement, the state prisoner must give "state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 844-45 (1999). This means that a petitioner must demonstrate that the claim was fairly presented to the state's highest court, either on direct appeal or in a post-conviction proceeding. See Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997)(citations omitted); Coverdale v. Snyder, 2000 WL 1897289 at *8 (D. Del. 2000). If the petitioner raises

the issue on direct appeal, then the petitioner does not need to raise the same issue again in a state post-conviction proceeding. Lambert, 134 F.3d at 513; Evans v. Court of Common Pleas, Delaware County, Pennsylvania, 959 F.2d 1227, 1230 (3d Cir. 1992)(citations omitted).

To "fairly present" a federal claim for purposes of exhaustion, a petitioner must present a legal theory and facts that are "substantially equivalent" to those contained in the federal habeas petition to the state's highest court. Doctor, 96 F.3d at 678. It is not necessary for the petitioner to identify a specific constitutional provision in his state court brief, provided that "the substance of the ... state claim is virtually indistinguishable from the [constitutional] allegation raised in federal court." Santana v. Fenton, 685 F.2d 71, 74 (3d Cir. 1982)(quoting Bisaccia v. Attorney Gen., 623 F.2d 307, 312 (3d Cir. 1980)). A petitioner may assert a federal claim without explicitly referencing a specific constitutional provision by: 1) relying on pertinent federal cases employing a constitutional analysis; 2) relying on state cases employing a constitutional analysis under similar facts; 3) asserting a claim in terms so particular as to call to mind a specific right protected by the United States Constitution; or 4) alleging a pattern of facts well within the mainstream of constitutional litigation. McCandless v. Vaughn, 172 F.3d 255, 261 (3d Cir. 1999); Evans,

959 F.2d at 1231. Furthermore, the state court does not have to actually consider or discuss the issues in the federal claim, provided that the petitioner did, in fact, present such issues to the state court. See Swanger v. Zimmerman, 750 F.2d 291, 295 (3d Cir. 1984).

B. Procedural Default

A petitioner's failure to exhaust state remedies will be excused if there is no available state remedy. Lines v. Larkins, 208 F.3d 153, 160 (3d Cir. 2000); see Teague v. Lane, 489 U.S. 288, 297-98 (1989). However, even though these claims are treated as exhausted, they are procedurally defaulted. Lines, 208 F.3d at 160. A federal court may not consider the merits of procedurally defaulted claims unless the petitioner demonstrates either cause for the procedural default and actual prejudice or a "fundamental miscarriage of justice." McCandless, 172 F.3d at 260; Coleman v. Thompson, 501 U.S. 722, 750-51 (1999); Caswell v. Ryan, 953 F.2d 853, 861-62 (3d Cir. 1992).

To demonstrate cause for a procedural default, a petitioner must show that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986). A petitioner can demonstrate "actual prejudice" by showing "not merely that the errors at . . . trial created a possibility of prejudice, but that they worked to his actual and substantial

disadvantage, infecting his entire trial with error of constitutional dimensions." Id. at 494. However, if the petitioner does not allege cause for the procedural default, then the federal court does not have to determine whether the petitioner has demonstrated actual prejudice. See Smith v. Murray, 477 U.S. 527, 533 (1986).

Alternatively, a federal court may excuse procedural default if the petitioner demonstrates that failure to review the claim will result in a fundamental miscarriage of justice. Edwards v. Carpenter, 529 U.S. 446 (2000); Wenger v. Frank, 266 F.3d 218, 224 (3d Cir. 2001). In order to demonstrate a "miscarriage of justice," the petitioner must show that a "constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray, 477 U.S. at 496. A petitioner establishes "actual innocence" by proving that no reasonable juror would have voted to find him guilty beyond a reasonable doubt. Sweger v. Chesney, 294 F.3d 506, 523-24 (3d Cir. 2002).

C. Review Under the AEDPA

A federal district court may consider a habeas petition filed by a state prisoner only "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Before the court can reach the merits of such a petition, the court must first

determine whether the requirements of the AEDPA are satisfied. Section 2254(d) states, in pertinent part, that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in the State court proceeding unless the adjudication of the claim –
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Based upon the language of § 2254(d)(1), a federal court cannot grant a writ of habeas corpus on a claim that was adjudicated in state court on the merits unless it finds that the state court decision either: 1) was contrary to established federal law; or 2) involved an unreasonable application of clearly established federal law. See Williams v. Taylor, 529 U.S. 362, 412 (2000).

The Third Circuit requires federal courts to utilize a two-step analysis when considering whether the state court decision falls into either category. Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 880 (3d Cir. 1999) (en banc); see also Werts, 228 F.3d at 197. The first step requires federal courts to identify the applicable Supreme Court precedent and then determine whether the state court decision is "contrary to" this precedent. Matteo, 171 F.3d at 888. "Relief is appropriate only if the petitioner shows that the 'Supreme Court precedent

requires an outcome contrary to that reached by the relevant state court.'" Werts, 228 F.3d at 197 (quoting O'Brien v. Dubois, 145 F.3d 16, 24-25 (1st Cir. 1998)). The petitioner cannot merely demonstrate "that his interpretation of Supreme Court precedent is more plausible than the state court's; rather, the petitioner must demonstrate that Supreme Court precedent requires the contrary outcome." Matteo, 171 F.3d at 888. Under this standard, habeas relief cannot be granted if the federal court merely disagrees with a state court's reasonable interpretation of the applicable precedent. Id.

If the federal court concludes that the state court adjudication is not contrary to the Supreme Court precedent, then the court must determine whether the state court judgment rests upon an objectively unreasonable application of clearly established federal law, as determined by the United States Supreme Court. Id. at 880. This analysis involves determining "whether the state court decision, evaluated objectively and on the merits, result[s] in an outcome that cannot reasonably be justified. If so, then the petition should be granted." Id. at 891. Moreover, "in certain cases it may be appropriate to consider the decisions of inferior federal courts as helpful amplifications of Supreme Court precedent." Id. at 890. However, once again, a federal court's mere disagreement with the state court's decision does not constitute evidence of an unreasonable application of Supreme Court precedent by a state

court. Werts, 228 F.3d at 197. For example, if the state court identifies the correct legal principle, "but unreasonably applies that principle to the facts of the prisoner's case," then habeas corpus relief is appropriate. Williams, 529 U.S. at 413.

Section 2254(d)(2) is not in issue in federal habeas petitions because the AEDPA requires a federal court to presume that a state court's determination of facts is correct. 28 U.S.C. § 2254(e)(1). This presumption of correctness applies to both explicit and implicit findings of fact. Campbell v. Vaughn, 209 F.3d 280, 286 (3d Cir. 2000). The petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. Campbell, 209 F.3d at 286.

IV. DISCUSSION

Petitioner asserts six grounds for relief in his habeas petition. (D.I. 47) First, petitioner claims that he was deprived of a fair trial by the admission of testimony regarding his prior criminal history. Second, petitioner alleges that the trial court erroneously limited the scope and substance of his allocution. Third, he asserts that the prosecutor's closing remarks regarding lack of petitioner's remorse violated his Fifth Amendment Right against self-incrimination. Fourth, petitioner contends that his trial counsel rendered ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments of the United States Constitution. Fifth, petitioner charges that

the Delaware Death Penalty Statute under which he was convicted and sentenced to death violates both the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment pursuant to the United States Supreme Court decision Ring v. Arizona, 536 U.S. 584 (2002).[11] Finally, he contends that the Superior Court erred by failing to instruct the jury regarding the burden of proof for non-statutory aggravating circumstances.

A. Testimony about petitioner's criminal history

Petitioner contends that he was denied a fair trial by the admission of testimony regarding his criminal history. (D.I. 47) Specifically, during the trial, Outten called as a witness Lisa Bedwell in an effort to discredit Gibbons' testimony. Ostensibly, Bedwell would testify that on the day of the murder, Gibbons called her and asked Bedwell to sell a stereo because Gibbons needed money. Shelton III, 744 A.2d 465, 481-82 (2000). During their conversation, "Gibbons provided Bedwell with multiple versions of the involvement and culpability of the individual co-defendants in Mannon's murder." Id. at 483.

On cross-examination, the State tried to show Bedwell was biased in favor of petitioner. Id.; Shelton II, 1997 WL 855718

[11]As stated above, petitioner was sentenced under the version of the Delaware Death Penalty Statute enacted on November 1, 1991. This version differs from the version enacted in 2002 previously mentioned in this opinion. For sake of clarity, when the court refers to the Delaware Death Penalty Statute hereforth, it means the version in effect when petitioner was sentenced to death, unless otherwise noted.

at *35. In so doing, the State explored the relationship Bedwell had with Outten and then petitioner:

> Q: Now, you indicated you knew [Gibbons] or you know Gibbons. Did you also know any of the defendants in this case:
> A: Yes, I do.
> Q: Okay, Did you know [Outten]?
> A: Yes, I do.
> Q: And how do you know [Outten]?
> A: I used to live down the street from him.
> Q: Where would that be?
> A: Collins Park, New Castle.
> Q: Approximately how many years have you known [Outten]?
> A: I'd say, twenty at least.
> Q: How about [Steven][petitioner], do you know [Steven], also?
> A: I know him. I don't know him, you know. I met him a couple of times.
> Q: You know him if you see him?
> A: Yes.
> Q: And about how long have you known [Steven]?
> A: What did you ask me about [Steven]?
> Q: How long, I mean, what period of time?
> A: I don't even know. I can't – I don't know.
> Q: A number of years, also?
> A: No. Well, it was right after he got out of prison the last time.
> THE COURT: That answer will be stricken and the jury is instructed quite clearly to disregard it.
> [Petitioner's trial counsel]: Can we come to sidebar[?]

Shelton II, 1997 WL 855718 at *36. At sidebar, petitioner's attorney moved for a mistrial, arguing that this testimony was prejudicial because the jury had a record of petitioner being in prison without additional explanation. Shelton III, 744 A.2d at 482. The trial court denied the motion for mistrial, finding that its "specific, clear, immediate instruction" cured any possible prejudice to petitioner. Id.

Immediately following the court's ruling, petitioner advised the court that he wished to fire his lawyer. Petitioner and his counsel indicted that petitioner warned his attorney in the middle of her cross-examination that Bedwell would testify that she knew petitioner since he was released from prison. Id. Contemporaneous with petitioner's warning, trial counsel rose to object on relevancy grounds, but Bedwell blurted the answer immediately before his objection. The Superior Court found that despite petitioner's warning, there was nothing that should have caused counsel to anticipate her response, In fact, in response to questions about her relationship with Outten, Bedwell framed her answers in terms of "years" rather than particular events. Moreover, the Superior Court found that the prosecutor had no way of knowing, from the discovery material provided, that Bedwell would answer in that manner.

On direct appeal, petitioner did not raise this issue for reversal. In his state post-conviction application, however, petitioner argued that trial counsel's failure to object or move in limine to exclude Bedwell's comment caused an unfair trial in violation of the due process clause. He asserted that his appellate counsel was ineffective for failing to raise this issue on direct appeal of his conviction. The Superior Court disagreed, found counsel was not ineffective and concluded that its curative instruction had solved any possible prejudice. Shelton II, 1997 WL 855718 at *37.

On appeal, the Delaware Supreme Court found that this claim was not presented in accordance with Rule 61(i)(3)[12] because petitioner had not raised the argument at trial or direct appeal. Shelton III, 744 A.2d at 481-484. Trial and appellate counsel's conduct, reasoned the Supreme Court, was not so deficient as to satisfy the cause and prejudice prerequisites necessary to defeat procedural default. Id. Rather, the Supreme Court considered Bedwell's comment "only mildly prejudicial, if at all" and effectively cured by the Superior Court's immediate instruction to disregard. Id. at 483.

Petitioner exhausted this claim in his state post-conviction application, however, respondent contends that federal review is procedurally barred because the Delaware Supreme Court concluded that petitioner failed to demonstrate cause or prejudice for not raising the issue pursuant to Rule 61. Rule 61 has been construed as an adequate state ground to preclude federal habeas review. DeShields v. Snyder, 830 F. Supp. 819, 822 (D. Del. 1993). (D.I. 50)

Petitioner argues that review is not precluded since the prejudice generated by Bedwell's answer is so clear and so tainted the jury's view of him that he was denied a fair trial.

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[12]According to Delaware Superior Court Criminal Rule 61(i)(3), any basis for relief that was not presented in the proceedings leading to the judgment of conviction is barred unless the movant shows cause for relief from the procedural default and prejudice from violation of the movant's rights.

He submits that cause is demonstrated because of the ineffective assistance of trial counsel in failing to preclude the testimony and of appellate counsel in not raising the claim on appeal.

Since petitioner presented the ineffective assistance claim to the Delaware Supreme Court, he has exhausted state remedies. To prevail on a Sixth Amendment claim of ineffective assistance of counsel, however, a petitioner must allege and establish facts satisfying the two-part test set forth by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984); Williams v. Taylor, 529 U.S. 362, 391 (2000). First, the petitioner must show that counsel's advice was unreasonable, Strickland, 466 U.S. at 690, and not "within the range of competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56-57 (1985)(quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)). In other words, the petitioner must demonstrate that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. A court must be highly deferential to counsel's reasonable strategic decisions when analyzing an attorney's performance. Id. at 689. For example, the Court noted in Strickland that:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties in making the evaluation, a court must indulge a strong presumption that counsel's

> conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Id. at 688-89 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

Second, the petitioner must demonstrate that he was actually prejudiced by counsel's errors. Strickland, 466 U.S. at 694. In this regard, the petitioner need not demonstrate that the outcome of the proceeding would have been different, only that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." Id. "The court is not engaging in a prophylactic exercise to guarantee each defendant a perfect trial with optimally proficient counsel, but rather to guarantee each defendant a fair trial, with constitutionally competent counsel. To assess an ineffectiveness claim properly, the court 'must consider the totality of the evidence before the judge or jury.'" Marshall v. Hendricks, 307 F.3d 36, 85 (3d Cir. 2002)(quoting Strickland, 466 U.S. at 695).

Although the issue of ineffective assistance of counsel is considered to be a mixed question of law and fact subject to de novo review, a presumption of correctness prevails with respect to a state court's determinations concerning historical facts.

Id. at 698. Therefore, the court notes that its latitude is conscripted. That is, petitioner

> must do more than show that he would have satisfied Strickland's test if his claim were being analyzed in the first instance, because under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment the state-court decision applied Strickland incorrectly . . . Rather, he must show that the [state court] applied Strickland to the facts of his case in an objectively unreasonable manner or that the state court's adjudication was contrary to our clearly established federal law.

Bell v. Cone, 535 U.S. 685, 698-99 (2002).

The Delaware Supreme Court thoroughly reviewed the record for conduct that would suggest ineffective assistance of counsel under Stickland.[13] In so doing, the Court found there was nothing proceeding Bedwell's testimony that gave rise for counsel to suspect or predict the response she gave. Bedwell's answers were framed in terms of "years" without reference to any particular events or dates. It is undisputed that, as soon as petitioner notified his attorney of Bedwell's probable answer, counsel rose to object, although was too late to prevent the statement. Immediately, the Superior Court admonished the jury to strike and disregard the statement. At sidebar, petitioner's counsel moved for a mistrial and admitted his objection was too late. The record, reasoned the Supreme Court, did not support a

[13]Likewise, on post-conviction review, the Superior Court conducted an expansive review of the record and concluded that counsel's conduct did not constitute ineffective assistance of counsel. Shelton II, 1997 WL 855718.

finding of ineffectiveness under Strickland. The court agrees and finds the Delaware Supreme Court's decision was neither contrary to nor an unreasonable application of established precedent.[14] Price v. Vincent, 538 U.S. 634 (2003).

B. Allocution

Historically, allocution developed into a common-law right of a capital defendant where, before imposition of death, the defendant was given the opportunity to invoke a defense that might convince the judge to commute the death sentence. Shelton III at 465. Since defendants at common-law were not afforded counsel, allocution was a defendant's only way to assert a defense to avoid the punishment of death.

Unlike testimony, allocution is an unsworn statement not subject to cross-examination. State v. Zola, 548 A.2d 1022, 1046 (N.J. 1988). Allocation serves two purposes: (1) it fulfills a societal belief that every defendant should have the right to ask for mercy; and (2) it allows a defendant to express his feelings of remorse. Shelton III, 744 A.2d at 492. Writing for the majority, Justice Frankfurter observed that

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[14]To the extent petitioner asserts admission of Bedwell's statement is contrary to Delaware Rule of Evidence 404, the claim is not viable on federal habeas review. Riley v. Taylor, 277 F.3d 261, 310, n.8 (3d Cir. 2001)("Ordinarily, federal habeas relief is not available for an error of state law: the habeas statute provides that a writ disturbing a state court judgement may issue only if a prisoner is in custody 'in violation of the Constitution or laws or treaties of the United States.'")(quoting 28 U.S.C. § 2241(c)(3)).

> [w]e are not unmindful of the relevant major changes that have evolved in criminal procedure since the seventeenth century - the sharp decrease in the number of crimes which were punishable by death, the right of the defendant to testify on his own behalf, and right to counsel. But we see no reason why a procedural rule should be limited to the circumstances under which it arose if reasons for the right it protects remain. None of these modern innovations lessens the need for the defendant, personally, to have the opportunity to present to the court his plea in mitigation. The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.

Shelton III, at 492 (quoting Green v. United States, 365 U.S. 301, 304 (1965)).

Petitioner argues that the Superior Court's restriction on his statement to the jury was contrary to United States Supreme Court precedent that established a defendant's right to a fair and individualized sentencing proceeding. See Lockett v. Ohio, 438 U.S. 586 (1978). Specifically, the limiting instruction prevented petitioner from discussing the circumstances of the offense, his conduct and relative culpability as a mitigating factor. (D.I. 47) He asserts that the Delaware Supreme Court's 3-2 vote to affirm the Superior Court's decision is contrary to federal law.

Since the Delaware Supreme Court addressed the merits of this argument on post-conviction review, respondent asserts that, to prevail, petitioner must demonstrate that the Court's decision was contrary to or was an unreasonable application of law as defined by the United States Supreme Court. See Hameen v.

Delaware, 212 F.3d 226, 235 (3d Cir. 2000). Respondent argues that, since there is no right to allocution in the Constitution and the United States Supreme Court has not established a "clear or consistent" path of jurisprudence for state courts to follow, the Delaware Supreme Court was not bound to follow precedent. See § 2254(d)(1).

Given the unique circumstances of petitioner's sentencing, the court turns to the record and the instruction given by the court. After being found guilty, petitioner informed the court that he was dissatisfied with trial counsel and he wanted to represent himself.[15] Shelton II, 1997 WL 8555718 at *18. He told the court that he did not want to present any mitigating evidence.[16] After an extensive colloquy lasting one and one-half hours, the Superior Court ruled that petitioner could represent himself and appointed his lawyer as standby counsel. Id. On the day the penalty phase was to commence, petitioner changed his mind and decided he wanted his attorney to resume representation. Petitioner demanded and was granted exclusive control over what his attorney would present as mitigating evidence to the jury. Petitioner did, however, want to speak to the jury. The Superior

[15]A more detailed discussion of the penalty phase is found at, *infra*, Section IV., D.

[16]The Superior Court observed that petitioner felt the murder was so heinous that nothing he could say to the jury would compel them to vote against the death penalty. Id. at *42.

Court gave petitioner instructions defining and limiting the scope of his allocution:

> Trial Counsel: Secondly, he asked that in my position of assisting him, that I be able to give closing argument to the jury and argue my position on - against the death penalty because he feels that I can do that better than he could. And he reserves, your Honor, most particularly and first and most importantly his right to allocution. He has indicated to me that he's prepared to take the stand and make a statement to the jury, with or without having called witnesses, and that he understands that he has a right to allocution without cross-examination.
> The Court: Well, if he takes the stand, he's not speaking in allocution as such. That will be a separate matter during which he cannot talk about the events of January 11 and 12, 1992.
>
> * * *
>
> The Court: Further, it does not prevent you in any way from speaking to the jury in allocution and to me. Do you understand that?
> Petitioner: Allocution, I don't-
> The Court: Allocution is a very technical word, speaking to the jury on your own behalf I apologize for using a word that [even] most lawyers don't know. Allocution is a very legalistic way for asking the sentencing authority, whether it's a judge or jury, to give you mercy, spare your life. That's what it really means, to explain your humanity, you know.
> Petitioner: I understand.
> The Court: Whether you want to - you can't argue about the facts. You can talk about yourself, your background, your upbringing, your education, your folks at home, any alcohol abuse problems, things like that. You just can't talk about the facts surrounding the murder. Do you understand that?
> Petitioner: Yes.

Shelton III, 744 A.2d at 490-491.

On March 3, 1993 petitioner spoke on allocution as follows:

> Ladies and gentlemen of the jury, I stand before you not to plead for my life. I feel that's wrong and improper and basically disrespectful of the victim's family and to mine. The state has painted a picture, and that picture is not very pretty, pertaining to me and my co-defendants. And I would just like to present

> to the jury a different side or a different meaning to Steven Shelton. The state has pictured me as being a monster, as being a rapist, as being a violent individual, but as you heard from my family, that's not so. The state only presents one side of the picture. There's two sides to every story. And the state just presents a negative side. The jury has found me guilty of these allegations, now it's the jury's turn to render a verdict. And the verdict is either life in jail or death. Again, I'm not here to plead for my life, but just ask the jury to be fair in their decisions. That's all I have to say.

Id.

In reviewing petitioner's post-conviction application, the Superior Court rejected his argument that the parameters placed on his allocution denied him a fair trial. Shelton II, 1997 WL 855718 at *44.

On appeal, the Delaware Supreme Court affirmed and traced the development of allocution. Shelton III, 744 A.2d at 492-496. In so doing, the Court recognized that the United States Supreme Court has mandated that the "accused be permitted to present 'any' evidence in mitigation of a death sentence, including the circumstances of the crime, so long as the evidence is relevant." Id. at 494 (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978)). The Delaware Supreme Court, however, concluded that the Lockett mandate is inapplicable to allocution. Id. According to the Court:

> Lockett, however, did not involve allocution not subject to cross-examination. It is essential to understand and apply properly this fundamental distinction between the unrestricted right to present relevant evidence and speaking in allocution without being subject to cross-examination. Notwithstanding the multitude of cases

> interpreting the right of an accused to present evidence in mitigation of a death sentence, the law surrounding the right to allocution, even in death penalty cases, remains unclear. Indeed, it is unclear under Delaware law. Thus, the issues presented here are of first impression.

Shelton III, 744 A.2d at 495. The Court declined to determine if the Eighth or Fourteenth Amendments allow a capital defendant to allocate. Instead, the Court found that the common law right of a defendant to speak in connection with a sentencing is based entirely on state law, i.e., Delaware Superior Court Criminal Rule 32(a)(1)(C) and the Delaware Death Penalty Statue, 11 Del C. § 4209. Id. at 495. The Court cautioned:

> Our conclusion that the defendant has a right to allocution as defined and limited here is not a right granted by either the federal or state constitutions. It is a right that is grounded on the Superior Court Criminal Rule, the Delaware Death Penalty Statute and Delaware decisional law. No federal constitutional, statutory or decisional law is implicated, and federal decisional law is referred only for the purpose of guidance.

Id. at 495-496. With this standard in mind, the Supreme Court concluded that the Superior Court's limiting instruction was "overbroad", but did not constitute error or prejudice to petitioner.[17]

Pursuant to 28 U.S.C. § 2254(d), the court must determine whether the Delaware Supreme Court's decision is contrary to or

[17]Because this case was so unique in that petitioner consciously decided against presenting mitigating evidence, the Court doubted that the limitation made any difference to the case. Shelton III, 744 A.2d at 498.

involved an unreasonable application of unambiguous, established federal law. See Lockyer v. Andrade, 538 U.S. 63, 71 (2003); Williams v. Taylor, 529 U.S. 362, 379 (2000); Price v. Vincent, 538 U.S. 634 (2003). As the Delaware Supreme Court thoroughly explored, however, there is no federal precedent. The Delaware Supreme Court's decision rested entirely on Delaware authority and explicitly rejected Lockett as dispositive. Absent a clear or consistent path created by the Supreme Court to follow, this court cannot reach the substance of this claim.

C. Prosecutor's closing remarks regarding lack of remorse

Petitioner argues that the prosecutor's comments about his lack of remorse violated his Fifth Amendment right against self-incrimination. Specifically, he asserts that the prosecutor's emphasis on petitioner's lack of expressed remorse was an indirect comment on his failure to testify and left the jury with the impression that petitioner had a duty to express remorse to avoid the death penalty. (D.I. 47) Petitioner contends that his trial counsel's failure to object to the comment as contrary to Lesko v. Lehman, 925 F.2d 1527 (3d Cir. 1991), constitutes ineffective assistance of counsel.

Because petitioner neither objected at trial nor raised on appeal the improper comment issue, the Superior Court, on post-conviction review, applied the Strickland test to determine if counsel's assistance was sufficiently deficient to defeat procedural default. Shelton II, 1997 WL 855718 at *45.

The Superior Court recognized that the prosecutor's comments could not be viewed in a vacuum, but instead were a response to petitioner's allocution. When petitioner stated that to ask for mercy would be disrespectful to Mannon and his family, the Superior Court interpreted that "he was saying it would be wrong, at that point, to express remorse." Id. at *46. Once raised by petitioner, the Superior Court found the prosecutor's statement was permissible and determined that petitioner failed to demonstrate that his trial counsel's failure to object and his appellate counsel's failure to raise the issue on appeal, was neither objectively unreasonable or prejudicial. Id.

On appeal, the Delaware Supreme Court affirmed. Shelton III, 744 A.2d at 503. The court concurs with the Superior Court's ruling, as affirmed by the Delaware Supreme Court, after reviewing the evidence of record. The court finds that the resolution of petitioner's claim by the Delaware Superior Court did not result in a decision contrary to, or involving an unreasonable application of, clearly established federal law.

At the outset, the court is mindful that it is not being asked to address whether the prosecutor's comment itself violated petitioner's Fifth Amendment privilege against self-incrimination. Rather, the court shall consider only whether trial counsel's conduct in failing to object to the prosecutor's comment satisfies the two-prong Strickland test for ineffective assistance of counsel. As evident from the parties' arguments,

these issues are quite interrelated, and the court takes great care to avoid blending them any further.

Against this backdrop, the court concludes that petitioner's trial counsel did not violate the first prong of the Strickland test in not objecting to the prosecutor's remark. Tactical decisions about whether to lodge objections fall squarely within the purview of trial strategy. A court must afford a strong presumption that trial counsel's conduct falls within the range of reasonable professional conduct. See Strickland, 466 U.S. at 688-89. Petitioner's trial counsel reasonably may have opted not to object so as to avoid calling attention to petitioner's apparent lack of remorse. Moreover, viewing trial counsel's decision from their perspective at the time of the penalty hearing, the court reasons that not objecting aligned with the defense strategy of maintaining that petitioner was not involved in the murder. Objecting, in contrast, may have suggested to the jury that the defense vacillated irresolutely between positions. For these reasons, the court concludes that petitioner cannot show by clear and convincing evidence that his trial counsel's strategy of withholding an objection was unreasonable.

Even if such strategy were unreasonable, the court finds that petitioner's claim fails the prejudice prong of Strickland because trial counsel did not err in not objecting to the prosecutorial remark. The Supreme Court has held that the Fifth Amendment self-incrimination clause bars a prosecutor from

commenting to the jury about a defendant's failure to testify at trial. Griffin v. California, 380 U.S. 609, 615 (1965). The Third Circuit has held, in turn, that the Griffin rule is applicable not only in the guilt phase, but also in the penalty phase of a death penalty trial. Lesko v. Lehman, 925 F.2d 1527, 1541 (3d Cir. 1991). To this end, the Third Circuit has observed that "the Griffin rule forbids prosecutorial comment about the defendant's failure to testify concerning the merits of the charges against him." Id. at 1542. However, the Third Circuit has recognized that a defendant who offers testimony of a biographical nature at the penalty phase does not retain a Fifth Amendment privilege against cross-examination or prosecutorial comment on matters reasonably related to his credibility or the subject matter of his testimony. Id. (citing Harrison v. United States, 392 U.S. 219, 222 (1968)). The Third Circuit also has opined that "[o]ur well-established test for determining whether a prosecutor's remark violates Griffin is 'whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.'" Id. at 1544(citing Bontempo v. Fenton, 692 F.2d 954, 959 (3d Cir. 1982)(internal citations omitted)). A court should examine the challenged prosecutorial remark in its trial context when making this determination.

Applying this test to the case at bar, the court disagrees with petitioner that Lesko "parallels" the instant case. The court recognizes that some facts at bar are similar to the those in Lesko. Neither Lesko nor petitioner testified during the guilt phase of trial. Both testified about limited topics during the penalty phase hearing. Beyond these two similarities, the court finds that the remaining pertinent facts differ. Lesko testified before the jury about his childhood and family background and was subject to cross-examination by the prosecutor. Petitioner, in contrast, allocuted before the jury, was not subject to cross-examination and did not detail his hardships.[18] The comments of the prosecutors were also distinctly different. In Lesko, the prosecutor stated:

> John Lesko took the witness stand, and you've got to consider his arrogance. He told you how rough it was, how he lived in hell, and he didn't even have the common decency to say I'm sorry for what I did. I don't want you to put me to death, but I'm not even going to say that I'm sorry.

Id. at 1540. In contrast, after petitioner's allocution, the prosecutor remarked:

> Another thing that judges, for me, the importance of what you do and what this all means is the remorse that has been shown in this case in the words of Jack Outten allocution and also Steven Shelton in allocution. And they told you or paid lip service that they had concerns for the families of the victim, what did you hear about their remorse for their acts? What did you hear about the concern for the families of the victim

[18] See *infra* Section IV. B.

> whose life was taken innocently, without any wrong that he caused any of these individuals?

Shelton II, 1997 WL 855718 at *45.

Since the prosecutor in Lesko made his comments following Lesko's direct testimony to the jury, his remarks squarely violate the Griffin test. In other words, as held by the Third Circuit, the natural and necessary interpretation of the prosecutorial remarks in Lesko was that Lesko had a moral or legal obligation during the penalty phase to address the charges against him and to apologize for his crimes. The court concludes that the prosecutorial comments at bar did not have the same effect on the jury. The prosecutor's comments were responsive and directed to the content of petitioner's allocution, not to his refusal to testify to the underlying murder. The comments do not contain any insinuation that petitioner should have emphasized his innocence during his allocution and that, since he did not, the jury should sentence him to death. The prosecutor's comments simply focused on matters reasonably related to petitioner's character. Consequently, the court finds that petitioner's claim of ineffective assistance of counsel premised on trial and appellate counsel's failure to object and appeal the prosecutor's remorse remarks fail.

D. Ineffective Assistance of Counsel at Sentencing

Petitioner contends that trial counsel failed to adequately prepare and gather mitigation evidence for the sentencing phase.

(D.I. 48) In fact, trial counsel admitted to the Superior Court that the extent of his preparation involved speaking with some of petitioner's family members for approximately three and a half hours after the guilty verdict. Shelton II, 1997 WL 855718 at *48. Trial counsel did not retain any type of expert witness nor were school or family records reviewed. Petitioner claims that counsel's presentation was not the result of trial strategy nor of the limitations he imposed, but was the result of poor preparation.[19] Petitioner asserts that if the jury had been

[19]In his reply (D.I. 52), petitioner urges the court to examine another capital case where the defendant was represented by the same trial counsel as petitioner. State v. Wright, 653 A.2d 288 (Del. Super. 1994). In Wright, the defendant's Rule 61 motion for post-conviction relief was granted because the Superior Court found that defense counsel's representation was so unreasonable that it denied the defendant his Sixth Amendment right to a fair trial. This court finds the decision uncompelling as to the issues at bar.

aware of the considerable mitigation evidence,[20] it likely would have recommended life imprisonment rather than a death sentence.

Respondent retorts that the Superior Court and Supreme Court decided this issue correctly on post-conviction review when each applied Strickland and found that counsel was not ineffective. Further, respondent notes that trial counsel's remark about three hours of preparation was not a complete representation of the work he performed on the case. Instead, petitioner's demands and restraints on counsel shaped the extent of the mitigation evidence presented.

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[20]In support of his post-conviction application, petitioner engaged the services of Pam Taylor, a forensic social worker, who reviewed numerous school and family court records and interviewed some of petitioner's family members. (D.I. 48) Taylor's report describes a violent and dysfunctional family. Taylor identified fourteen areas of mitigation evidence: (1) mother's alcohol consumption during pregnancy; (2) dysfunctional rearing by alcoholic parents; (3) physical abuse during formative years; (4) emotional abuse during formative years; (5) stressful home environment during early development; (6) additional childhood experiences of physical and emotional victimization by peer group, as minority member of a predominantly African American neighborhood; (7) prevailing negative family reputation and associated negative expectations which preceded petitioner in the school and court systems; (8) lack of modeled or instilled moral values; (9) lack of protective, supportive resources; (10) lack of opportunity to benefit from recommended psychotherapeutic intervention; (11) gaps in existing community resources to identify and intercede in abusive domestic situations and to insure early preventative mental health to its young victims; (12) delayed identification by school system of specialized learning needs; (13) early-onset substance abuse problems; and (14) impaired personality organization, stemming from childhood experiences. (Id. at A000122-A000131) The Superior Court was also presented with Taylor's report. Shelton II, 1997 WL 855718 at *62.

As noted above, the court cannot grant a petition for habeas corpus on a claim that has been adjudicated on the merits by the state court unless the adjudication resulted in a decision contrary to, or involved an unreasonable application of, clearly established federal law. The court does not find either possibility implicated in the case at bar.

The Superior Court found no evidence of ineffective assistance of counsel under Strickland after reviewing a unique set of facts. Specifically, following the guilty verdict, petitioner again attempted to fire his attorney.[21] After extensive questioning of petitioner, which included a review of the numerous mitigating factors counsel had identified for the penalty phase, the Superior Court granted petitioner's request to represent himself.[22] A few days later when petitioner changed his mind and wished to have counsel assist him, the Superior Court found that, after deliberate consideration for months preceding the trial, petitioner did not want to present certain mitigating evidence to the jury and placed significant limitations on what he allowed his counsel to present. Shelton II, 1997 WL 855718 at *47-55. The Superior Court identified the conditions as follows:

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[21]Recall that after Bedwell blurted out information about petitioner's prior prison sentence, he tried to fire his attorney. See ,*infra*, Section IV. A.

[22]The lengthy list of factors was included in counsel's letter prepared pursuant to 11 Del C. § 4209(c).

> One, while counsel and Steven were to consult about the questions to be asked, they had to be approved by Steven. Two, Steven had veto power over which witnesses would be called. He and counsel had discussed which witnesses were to be called. They also discussed which mitigating circumstances would or would not be covered by these witnesses, i.e., some circumstances would not be covered. Three, counsel would be able to offer closing argument to the jury. Fourth, Steven reserved the right to speak in allocution.

Id., at *19.

In a detailed analysis, the Superior Court concluded that petitioner had failed to demonstrate that his trial counsel's performance was either objectively unreasonable or prejudicial. Id. at *56.[23] The Delaware Supreme Court affirmed this decision after a separate analysis under Strickland. See Shelton III, 744 A.2d at 505. Having independently reviewed the evidence, the court agrees with the Superior Court's findings of fact and legal analysis. The court also concludes that the resolution of this claim by the Delaware Superior Court, as affirmed by the Delaware Supreme Court, was based on a reasonable determination of the facts and reflected a reasonable application of Strickland.

With respect to trial counsel's duty to investigate, the United States Supreme Court has observed that "strategic choices made after thorough investigation of law and facts relevant to

[23]On the mitigation of evidence section, the Superior Court devotes almost 30 pages to a review of trial testimony and expert reports to form its conclusion. Shelton II, 1997 855718 at *46-75.

plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91. In line with the Supreme Court's observation, the Third Circuit has held that "the reasonableness of counsel's actions may be affected by the defendant's actions and choices, and counsel's failure to pursue certain investigations cannot be later challenged as unreasonable when the defendant has given counsel reason to believe that a line of investigation should not be pursued." United States v. Gray, 878 F.2d 702, 710 (3d Cir. 1989). On this basis, the court concludes that petitioner cannot now argue the reasonableness of this strategy. Indeed, the Supreme Court cautioned: "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence." Strickland, 466 U.S. at 689.

Turning to consider the presentation of mitigation evidence from trial counsel's view point at the time of his conduct in question, the court concludes that trial counsel's decisions were controlled and circumscribed by petitioner. As discussed above, petitioner vacillated in his decision to represent himself or use trial counsel. After finally agreeing to allow trial counsel to continue representation, petitioner demanded that he approve all mitigation witnesses and evidence. Despite counsel's attempt to

vigorously fight against the death penalty, petitioner refused to assist in this pursuit and remained steadfast in his decision to not beg for mercy or use his family.[24] Recognizing petitioner's potentially detrimental position, the Superior Court conferenced with the parties several times to explain the dangers of petitioner's strategy and the consequences of his decisions. See, e.g., Shelton II, 1997 WL 855718 at *18. These conversations reflect that petitioner demonstrated a careful and thorough decision making process on how to proceed.

Petitioner[25] focuses on trial counsel's statement that he spent an hour or so talking with his family as a group in preparation for the sentencing phase as evidence of ineffective assistance. The court finds, however, that the Superior and Supreme Courts' analyses of these facts in light of Strickland were not unreasonable. Given the discussions with petitioner, trial counsel had no reason to believe that additional witnesses should be called at the penalty phase to attest to petitioner's difficult life or that a further investigation of petitioner's life was necessary.

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[24]Petitioner did allow his attorney to present his three half-siblings as witnesses.

[25]Petitioner also submits the opinion of a defense attorney who concludes that trial counsel provided ineffective assistance of counsel in the penalty-phase of his trial. (D.I. 48 at A000144-A000159)

Even assuming, arguendo, that trial counsel's performance was deficient, petitioner has failed to demonstrate that he was prejudiced by it. Petitioner was not helpful in the preparation of his case for the penalty phase. Further, the court is unpersuaded that there is a reasonable probability that the jury, if presented with either additional witnesses at the penalty phase or with petitioner's school or family court history, would have concluded that the balance of aggravating and mitigating circumstances did not warrant a death sentence. Although the jury did not learn all the details of petitioner's troubled and physically abusive upbringing, learning disabilities, truancy problems, possible physical ailments, and school record, the jury was alerted to some of the difficulties in his life through the testimony of his half-brother and sisters. On the basis of this testimony, the court finds that the jury learned of some of the mitigating evidence that petitioner claims erroneously was not introduced due to trial counsel's ineffectiveness. Moreover, the court finds that petitioner has failed to show with a reasonable probability that the jury verdict of 8-4 in favor of death would have been decidedly different if a particular witness testified or if a particular fact about his history was made known at the penalty phase. Indeed, admission of the evidence that petitioner seeks to now offer may actually have harmed his case and accentuated his propensity for violence. The court, consequently, concludes that petitioner's claim of ineffective

assistance of counsel on grounds of failure to present a competent mitigation strategy fails on the merits.

E. The Delaware Death Penalty Statute

Petitioner complains that the Delaware Death Penalty Statute violates the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment in light of the Ring decision.[26] In Ring, the United States Supreme Court held that the Sixth Amendment right to a jury trial requires that a jury, not a judge, decide beyond a reasonable doubt the existence of any fact that increases the maximum punishment for first-degree murder from life imprisonment to death. Ring, 536 U.S. at 589. Petitioner contends that this holding, when coupled with Caldwell v. Mississippi, 472 U.S. 320 (1985), prohibits a judge from deciding an accused's ultimate sentence as under the Delaware Death Penalty Statute. Therefore, petitioner maintains that a Caldwell violation will result if the court upholds the constitutionality of the Delaware Death Penalty Statute under Ring and denies his motion for habeas relief.

1. Procedural Bar

In his state court proceedings, petitioner did not claim that Delaware's capital sentencing structure violated his Sixth

[26]Though decided ten years after petitioner was sentenced to death under the Delaware Death Penalty Statute, petitioner asserts that Ring is retroactively applicable to his case because it satisfies the test for retroactivity announced in Teague v. Lane, 489 U.S. 288 (1989).

Amendment right to a jury trial or his due process rights under the Fourteenth Amendment. Petitioner, consequently, is procedurally barred under AEDPA from raising these claims in this habeas proceeding. Nevertheless, petitioner may escape the procedural default doctrine by showing either cause for the default and prejudice or establishing a fundamental miscarriage of justice.[27] Petitioner makes neither showing. Despite this, the court finds that the Ring decision excuses petitioner's default on the former grounds. The Supreme Court has held that "cause" to excuse a procedural default may exist "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel." Reed v. Ross, 468 U.S. 1, 16 (1984). Petitioner's claim under Ring falls into this category. At the time of petitioner's state court proceedings, the United States Supreme Court had not decided Ring. Petitioner's post-conviction counsel, therefore, could not have challenged his conviction on Ring grounds during any of the state court proceedings. The instant habeas proceeding presents petitioner with the first opportunity to raise this challenge. The court,

[27]Justice O'Connor stated in her dissent in Ring: "I fear that the prisoners on death row in Alabama, Delaware, Florida, and Indiana, which the Court identifies as having hybrid sentencing schemes in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determination . . . may also seize on today's decision to challenge their sentences. There are 529 prisoners on death row in these States." Ring, 536 U.S. at 584-85.

consequently, concludes that petitioner has the requisite cause to excuse his procedural default.

The court, however, finds that petitioner was not prejudiced by the procedure employed during the penalty phase. At petitioner's sentencing hearing, the judge was charged with the ultimate decision of determining whether the evidence showed beyond a reasonable doubt the existence of at least one aggravating circumstance. The jury merely functioned in a non-binding advisory capacity counter to the role afforded to the jury in Ring. Nevertheless, the aggravating factors implicated in Mannon's murder were of an objective nature such that a judge necessarily would have reached the same conclusion as a jury regarding the existence of these circumstances. The first factor was that "[t]he victim was [sixty-two] years of age or older." See 11 Del. C. § 4209(e)(1)(r). Mannon was sixty-two years old when petitioner and the Sheltons killed him. The second factor was that "[t]he murder was committed while the defendant was engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit any degree of rape, unlawful sexual intercourse, arson, kidnaping, robbery, sodomy or burglary." See 11 Del. C. § 4209(e)(1)(j). Mannon was killed during the course of a robbery. The last factor was that "[t]he murder was committed for pecuniary gain." See 11 Del. C. § 4209(e)(1)(o). Petitioner, Nelson and Outten killed Mannon for his money and jewelry. Therefore, the court concludes that

petitioner cannot show that the state's failure to sentence him under the type of scheme outlined in Ring worked to his actual and substantive disadvantage. Accordingly, petitioner is procedurally barred from bringing his Sixth Amendment and Due Process claims in this habeas proceeding.

2. Retroactivity[28]

a. The Legal Standard

Alternatively, if petitioner is not procedurally barred from advancing a Ring claim, the court must determine whether the Ring decision should be retroactively applied to this habeas corpus action on collateral review. The initial step in analyzing the retroactivity of a new rule of law is to determine whether the rule is substantive or procedural in nature because "'the Supreme Court has created separate retroactivity standards for new rules of criminal procedure and new decisions of substantive law.'" See United States v. Swinton, 333 F.3d 481, 487 (3d Cir. 2003) (quoting In re Turner, 267 F.3d 225, 229 (3d Cir. 2001) (internal citations omitted)). The distinction between "substantive" and

[28]The court acknowledges that the United States Supreme Court granted certiorari on December 1, 2003 in Schriro v. Summerlin, 124 S.Ct. 833 (2003), to address the very issues at bar, namely, (1) whether the rule announced in Ring is substantive, rather than procedural, and therefore exempt from Teague's retroactivity analysis, and (2) if the rule is procedural, whether it fits within the "watershed" exception to the general rule of non-retroactivity. Nonetheless, because this case has been stayed multiple times awaiting various appellate decisions, the court has determined that another stay would not serve the interests of justice.

"procedural," however, is not always easy to discern. Indeed, the Third Circuit has observed that cases in the habeas context in particular do "not fit neatly under either the substantive standard for determining retroactivity or the procedural standard." United States v. Woods, 986 F.2d 669, 671 (3d Cir. 1993). Despite this difficulty, the Supreme Court has recognized that it is an important distinction in the habeas context because the principal function of habeas relief is to assure that no man is incarcerated under a procedure that creates the risk that an innocent man will be convicted. Bousley v. United States, 523 U.S. 614, 620 (1998).

In general, substantive rules determine the meaning of a criminal statute so that conduct that formerly resulted in criminal liability may no longer be illegal. Id. The Supreme Court has observed that "decisions of this Court holding that a substantive federal criminal statute does not reach certain conduct, like decisions placing conduct 'beyond the power of the criminal law-making authority to proscribe,' necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal." Id. at 620-21. Decisions announcing substantive rules, consequently, often address the criminal significance of certain facts or the underlying prohibited conduct. See Curtis v. United States, 294 F.3d 841, 843 (7th Cir. 2002).

In contrast, a procedural rule does not interpret the scope of a statute. Bousley, 523 U.S. at 621. A procedural rule changes the way a case is adjudicated, not what the government must prove to establish a criminal offense. New procedural rules "recognize[] a constitutional right that typically applies to all crimes irrespective of the underlying conduct, and to all defendants irrespective of their innocence or guilt." Coleman v. United States, 329 F.3d 77, 84 (2d Cir. 2003). New rules of substantive criminal law, therefore, are presumptively retroactive on habeas review, id. at 620, whereas new rules of criminal procedures are presumptively non-retroactive on habeas review. Teague, 489 U.S. at 306, 310.

In Teague, the Supreme Court announced principles regarding retroactivity in the habeas context for new rules of criminal procedure.[29] The Supreme Court explained that because of the interest in finality of judgments in the criminal justice system, a new rule of criminal procedure does not apply retroactively to cases that have become final before the new rule is announced unless the new rule falls within one of two narrow exception categories. Id. at 309-10. The Supreme Court specifically recognized that

[29]"Although there was no majority opinion in Teague, the Supreme Court has since treated Justice O'Connor's plurality opinion as setting forth the holding of the Court." Coleman, 329 F.3d at 82 n.3 (2d Cir. 2003) (citing Tyler v. Cain, 533 U.S. 656, 665 (2001)).

> [a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect.. . . The 'costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus . . . generally far outweigh the benefits of this application.'

Id. at 309-310 (quoting Solem v. Stumes, 465 U.S. 638, 654 (1994)).

As a result of the interest in finality, a reviewing court must conduct a three-step analysis after finding a new rule procedural in nature to decide whether Teague bars retroactive application of the rule. First, the reviewing court "must ascertain the date on which the defendant's conviction and sentence became final." Caspari v. Bohlen, 510 U.S. 383, 390 (1994). "Final, in the context of [a] retroactivity analysis, means that a judgment of conviction has been entered, the time for direct appeals from that judgment has expired, and the time to petition the United States Supreme Court for certiorari has expired." Diaz v. Scully, 821 F.2d 153, 156 (2d Cir. 1987). Second, the reviewing court must survey "the legal landscape" as it existed on the date that the defendant's conviction became final and determine if a "court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule . . . [already] was required by the Constitution." Caspari, 510 U.S. at 390. That is, "a case announces a new rule [of criminal

procedure] when it breaks new ground or imposes a new obligation on the [s]tates or the [f]ederal [g]overnment. To put it differently, a case announces a new rule [of criminal procedure] if the result was not dictated by precedent existing at the time the defendant's conviction became final." Teague, 489 U.S. at 301 (citations omitted). If existing precedent already required application of the rule, then the Teague retroactivity bar does not apply. However, if the procedure at issue is considered new for Teague purposes, then the court must proceed to the third step of the analysis and determine whether an exception applies. To this end, a new rule of criminal procedure will apply retroactively if it either (1) "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe;" or (2) "requires the observance of those procedures that are implicit in the concept of ordered liberty." Id. at 311 (internal quotations omitted). The first exception overcomes the presumption against retroactivity only if the new rule "places a class of private conduct beyond the power of the State to proscribe or addresses a 'substantive categorical guarante[e] accorded by the Constitution,' such as a rule 'prohibiting a certain category of punishment for a class of defendants because of their status or offense.'" Saffle v. United States, 494 U.S. 484, 494 (2000)(internal citations and quotations omitted). The second exception is reserved for "watershed rules of criminal procedure." Teague, 481 U.S. at

311. Such rules are those in which (1) a failure to adopt the new rule "creates an impermissibly large risk that the innocent will be convicted," and (2) "the procedure at issue . . . implicates the fundamental fairness of the trial." Id. at 312. Following the Teague decision, the Supreme Court explained in Sawyer v. Smith, 497 U.S. 227, 242 (1990)(citing Teague, 489 U.S. at 311), that

> [i]t is thus not enough under Teague to say that a new rule is aimed at improving the accuracy of trial. More is required. A rule that qualifies under this exception must not only improve accuracy, but also "alter our understanding of the bedrock procedural elements" essential to the fairness of a proceeding.

In light of this explanation, watershed rules overcome the presumption against retroactivity only if they "improve accuracy [of trial]" and "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.'" Sawyer, 497 U.S. at 242.

Having defined the analytical framework for a retroactivity analysis, the court must consider whether Ring announced a substantive rule or a procedural rule as to Delaware criminal law. The court notes that this question is a matter of first impression in this district. If Ring only stands for the proposition that every element of a crime must be submitted to a jury, then it could be characterized as a pure procedural rule that extends Apprendi v. New Jersey, 530 U.S. 466 (2000), in the context of a capital crime. If, on the other hand, Ring is

construed to define the offense of capital murder under Delaware law, then it may be regarded as a substantive decision.

In Apprendi, the defendant fired several bullets into the home of an African American family that had recently moved into a previously all-white New Jersey neighborhood. The defendant pled guilty to possession of a firearm for an unlawful purpose, a crime that New Jersey's substantive criminal statute designated as a second-degree offense punishable under New Jersey's felony sentencing statute by a five to ten year prison term. The trial judge enhanced the defendant's sentence to twelve years pursuant to the New Jersey hate crime law after finding that the defendant's underlying crimes were motivated by racial bias.[30] Id. at 469-70.

The defendant challenged the constitutionality of New Jersey's hate crime statute, arguing that the Due Process Clause "requires that the finding of bias upon which [the] hate crime sentence was based must be proved to a jury beyond a reasonable doubt." Id. at 471. The United States Supreme Court agreed with the defendant and held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a

[30]Under the New Jersey hate crime law, a trial judge may extend the term of imprisonment if he finds by a preponderance of the evidence that the defendant acted purposefully to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation, or ethnicity.

jury, and proved beyond a reasonable doubt." Id. at 490. The Supreme Court commented that it is immaterial whether the required fact-finding is labeled an "element" or a "sentencing factor." Rather, the Supreme Court explained that "the relevant inquiry is not one of form, but of effect - does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" Id. at 494. The Supreme Court also expressly declared that its decision did not impact substantive New Jersey criminal law, stating "the substantive basis for New Jersey's enhancement is not at issue; the adequacy of New Jersey's procedure is." Id. at 475.

In Ring, the defendant participated in an armed robbery of a Wells Fargo armored van. The van driver was killed by a single gunshot to the head during the course of the robbery. The jury found the defendant guilty of felony-murder as opposed to premeditated murder. Based solely on this jury verdict, the maximum punishment he could have received under Arizona law was life imprisonment. Nevertheless, the defendant was eligible for the death penalty if he was the victim's actual killer or if he was "a major participant in the armed robbery that led to the killing and exhibited a reckless disregard or indifference for human life." See Enmund v. Florida, 458 U.S. 782 (1982)(holding that the Eighth Amendment permits execution of a felony-murder defendant who killed or attempted to kill); see also Tison v. Arizona, 481 U.S. 137, 158 (1987)(holding that the Eighth

Amendment also permits execution of felony-murder defendant, who did not kill or attempt to kill, but who was a "major participant in the felony committed" and who demonstrated "reckless indifference to human life"). Citing accomplice testimony at the sentencing hearing, the judge found both that the defendant was the actual killer and that he was a major participant in the armed robbery. The judge also found two aggravating factors and one non-statutory mitigating factor. The judge concluded that the mitigating circumstance did not "call for leniency" and, thus, sentenced the defendant to death.[31]

The defendant appealed his sentence, arguing that Arizona's capital sentencing scheme violated the Sixth and Fourteenth Amendments because it required a judge to find the facts particular to raising the maximum penalty for a crime. The Supreme Court concluded that, "[b]ecause Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." Ring, 536 U.S. at 609 (citing

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[31]Under Arizona law, first-degree murder is punishable by death or life imprisonment. See Ring, 536 U.S. at 592 (citing Ariz. Rev. Stat. Ann. 13-1105(c) (2001)). The trial judge is to conduct a separate hearing to determine the existence or non-existence of certain enumerated circumstances to determine the sentence to impose. Id. (citing Ariz. Rev. Stat. Ann. 13-703 (2001)). The statute also instructs that "[t]he hearing shall be conducted before the court alone. The court alone shall make all factual determinations required by this section or the constitution of the United States or this state." Id. (quoting Ariz. Rev. Stat. Ann. 13-703 (2001)).

Apprendi, 530 U.S. at 494, n. 19). The Supreme Court observed that "[t]he right to trial by jury would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death."[32] Ring, 536 U.S. at 609. Accordingly, the Supreme Court held that "[c]apital defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." Id. at 589.[33]

b. Ring v. Arizona: A New Rule of Criminal Procedure

After careful review of both Apprendi and Ring, the court agrees with the Tenth and Eleventh Circuits and various state appellate courts that Ring is an extension of Apprendi. See Turner v. Crosby, 339 F.3d 1247, 1284 (11th Cir. 2003); Cannon v. Mullin, 297 F.3d 989, 994 (10th Cir.); Woldt v. People, 64 P.3d

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[32]Justice Stevens's dissent in Walton v. Arizona, 497 U.S. 639 (1990), foreshadows this observation. Justice Stevens argued that "Arizona's aggravating circumstances . . . operate as statutory 'elements' of capital murder under Arizona law because in their absence, that sentence is unavailable." Id. at 709 & n.1. Justice Stevens further contended that "findings of factual elements necessary to establish a capital offense" must be determined by a jury rather than a judge. Id. at 710-14.

[33]In reaching this holding, the Supreme Court expressly overruled Walton, a decision that upheld Arizona's capital sentencing structure under which a judge, rather than a jury, determined whether the prosecution had established an aggravating factor necessary to subject the defendant to the death penalty.

256, 266 (Colo. 2003); Wright v. State, 857 So.2d 861, 877-78 (Fla. 2003); Leone v. State, 797 N.E.2d 743, 750 (Ind. 2003); State v. Whitfield, 107 S.W.3d 253, 257 (Mo. 2003); Colwell v. State, 59 P.3d 463, 469 (Nev. 2002); Colwell v. Nevada, 124 S. Ct. 462 (2003); Murphy v. State, 54 P.3d 556, 566 (Okla. Crim. App. 2002). That is, Apprendi dictates the type of fact-finding process that must be employed in a criminal sentencing hearing. Ring applies Apprendi to capital crimes, prescribing what fact-finding process must be in employed in a capital sentencing hearing. Because the Third Circuit and every other federal appellate court that has considered whether Apprendi created a substantive or a procedural rule has found it to be procedural, the court is compelled to follow this precedent and find that Ring likewise is procedural. See Sepulveda v. United States, 330 F.3d 55, 62-63 (1st Cir. 2003); Coleman, 329 F.3d at 83-88 (2d Cir. 2003); United States v. Jenkins, 333 F.3d 151, 154 (3d 2003); Swinton, 333 F.3d at 489 (3d Cir. 2003); United States v. Sanders, 247 F.3d 139, 147-48 (4th Cir. 2001); United States v. Brown, 305 F.3d 304, 307-09 (5th Cir. 2002); Curtis, 294 F.3d at 842-44 (7th Cir. 2002); Cannon, 297 F.3d at 994 (10th Cir. 2002). The court notes that this finding aligns with the decisions of three federal appellate courts that have considered the substantive/procedural question for Ring. See Turner, 339 F.3d at 1284; Cannon, 297 F.3d at 994; In re Johnson, 334 F.3d 403, 405 n.1 (5th Cir. 2003)(dicta); see also Summerlin v. Stewart,

341 F.3d 1082, 1101 (9th Cir. 2003)(holding Ring to announce a procedural rule in part). Accordingly, the court will analyze Ring under Teague to ascertain whether Ring should be retroactively applied on collateral review.

c. Analysis of Ring v. Arizona Under Teague v. Lane

As the first step in a Teague analysis, the court must ascertain the date that petitioner's conviction became final. The United States Supreme Court denied petitioner's application for a writ of certiorari on June 19, 1995. See Shelton v. Delaware, 515 U.S. 1145 (1995). The relevant date for this analysis, therefore, is June 19, 1995.

Next, the court must survey "the legal landscape" as it existed on June 19, 1995 to determine whether the result in Ring was dictated by then-existing precedent. Under the capital sentencing scheme for first-degree murder contained within the Delaware Death Penalty Statute in effect throughout 1995, a sentence of death could be imposed only under the bifurcated procedure prescribed by 11 Del. C. § 4209. Hameen v. State, 212 F.3d 226, 231-32 (3d Cir. 2000)(quoting Wright v. State, 633 A.2d 329, 335 (Del. 1993)). "Any person convicted of first-degree murder shall be punished by death or by imprisonment for the remainder of his or her natural life without benefit of probation or parole or any other reduction." 11 Del. C. § 4209(a) (1991). Under § 4209(b), a hearing had to be conducted on the issue of

punishment to determine the precise sentence. If the defendant was convicted of first-degree murder by a jury, then the jury was required to recommend answers to the following questions:

> (1) [w]hether the evidence show[ed] beyond a reasonable doubt the existence of at least [one] aggravating circumstance as enumerated in subsection (e) of this section;[34] and

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[34]Section 4209(e)(1) provided for twenty-two possible aggravators: (a) the murder was committed by a person in, or who has escaped from, the custody of a law-enforcement officer or place of confinement; (b) the murder was committed for the purpose of avoiding or preventing an arrest or for the purpose of effecting an escape from custody; (c) the murder was committed against any law-enforcement officer, corrections employee or firefighter, while such victim was engaged in the performance of official duties; (d) the murder was committed against a judicial officer, a former judicial officer, Attorney General, former Attorney General, Assistant or Deputy Attorney General or former Assistant or Deputy Attorney General, State Detective or former State Detective, Special Investigator or former Special Investigator, during, or because of, the exercise of an official duty; (e) the murder was committed against a person who was held or otherwise detained as a shield or hostage; (f) the murder was committed against a person who was held or detained by the defendant for ransom or reward; (g) the murder was committed against a person who was a witness to a crime and who was killed for the purpose of preventing the witness's appearance or testimony in any grand jury, criminal or civil proceeding involving such crime, or in retaliation for the witness's appearance or testimony in any grand jury, criminal or civil proceeding involving such crime; (h) the defendant paid or was paid by another person or had agreed to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim; (i) the defendant was previously convicted of another murder or manslaughter or of a felony involving the use of, or threat of, force or violence upon another person; (j) the murder was committed while the defendant was engaged in the commission of, or attempt to commit, or flight after committing or attempting to commit any degree of rape, unlawful sexual intercourse, arson, kidnapping, robbery, sodomy or burglary; (k)the defendant's course of conduct resulted in the deaths of [two] or more persons where the deaths are a probable consequence of the defendant's conduct; (l) the murder was outrageously or wantonly vile, horrible or inhuman in that it

> (2) [w]hether, by a preponderance of the evidence, after weighing all relevant evidence in aggravation or mitigation which [bore] upon the particular circumstances or details of the commission of the offense and the character and propensities of the offender, the aggravating circumstances found to exist outweigh[ed] the mitigating circumstances found to exist.

11 Del. C. § 4209(c)(3). The trial court, after considering the recommendation of the jury as to both questions, was required to decide the same questions. 11 Del. C. § 4209(d). If the court answered both questions in the affirmative, then it had to impose a sentence of death; otherwise, it had to impose a sentence of

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involved torture, depravity of mind, use of an explosive device or poison or the defendant used such means on the victim prior to murdering the victim; (m) the defendant caused or directed another to commit murder or committed murder as an agent or employee of another person; (n) the defendant was under a sentence of life imprisonment, whether for natural life or otherwise, at the time of the commission of the murder; (o) the murder was committed for pecuniary gain; (p) the victim was pregnant; (q) the victim was severely handicapped or severely disabled; (r) the victim was [sixty-two] years of age or older; (s) the victim was a child [fourteen] years of age or younger, and the murder was committed by an individual who is at least [four] years older than the victim; (t) at the time of the killing, the victim was or had been a non-governmental informant or had otherwise provided any investigative, law enforcement or police agency with information concerning criminal activity, and the killing was in retaliation for the victim's activities as a non-governmental informant or in providing information concerning criminal activity to an investigative, law enforcement or police agency; (u) the murder was premeditated and the result of substantial planning; and (v) the murder was committed for the purpose of interfering with the victim's free exercise or enjoyment of any right, privilege or immunity protected by the First Amendment to the United States Constitution, or because the victim has exercised or enjoyed said rights, or because of the victim's race, religion, color, disability, national origin or ancestry.

life imprisonment without the possibility of probation, parole, or other reduction in sentence. Id. "Thus, the Superior Court [bore] the ultimate responsibility for imposition of the death sentence [under the Delaware Death Penalty Statute] while the jury act[ed] in an advisory capacity 'as the conscience of the community.'" Hameen, 212 F.3d at 232 (quoting State v. Cohen, 604 A.2d 846, 856 (Del. Super. 1992)). Following careful review of the provisions of the Delaware Death Penalty Statute, there is no doubt that Ring positively announced a new rule of criminal procedure not dictated by precedent as it existed in 1995. That is, the Delaware Death Penalty Statute did not require the jury to act as the final decision-maker concerning the existence of aggravating circumstances. The court, therefore, must proceed to the third step in the analysis, namely, whether either one of the two Teague exceptions apply to the facts at bar.

The first category of rules excepted from Teague's retroactivity bar is that which places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." Teague, 489 U.S. at 307. Ring clearly does not avail this exception. See Turner, 339 F.3d at 1285 (holding that Ring does not implicate the first Teague exception). Just as numerous courts have recognized that Apprendi did "not decriminalize any class of conduct or prohibit a certain category of punishment for a class of defendants," Ring likewise did not decriminalize first-degree murder or prohibit

the State from punishing first-degree murder. See, e.g., Jones v. Smith, 231 F.3d 1227, 1237 (9th Cir. 2000)(holding that "the first exception identified in Teague is plainly inapplicable here, where the state's authority to punish petitioner for attempted murder is beyond question"); United States v. Sanders, 247 F.3d 139, 148 (4th Cir. 2001)(holding that "the first exception clearly does not apply here because Apprendi did not place drug conspiracies beyond the scope of the state's authority to proscribe").

The second category of rules excepted from Teague's retroactivity bar is that which "requires the observance of those procedures that are implicit in the concept of ordered liberty." Teague, 489 U.S. at 307. "This exception is a narrow one, and its narrowness is consistent with the recognition underlying Teague that retroactivity 'seriously undermines the principle of finality which is essential to the operation of our criminal justice system.'" Spaziano v. Singletary, 36 F.3d 1028, 1042-43 (11th Cir. 1994)(quoting Teague, 489 U.S. at 309). The Supreme Court has emphasized the narrowness of this second exception by using as a prototype the rule of Gideon v. Wainwright, 372 U.S. 335 (1963),[35] and by noting that "we believe it unlikely that

[35]In Gideon v. Wainwright, 372 U.S. 335 (1963), the Supreme Court held that the right of an indigent defendant in a criminal trial to have the assistance of counsel is a fundamental right essential to a fair trial. This decision dramatically changed American criminal procedure by requiring states to provide counsel in all criminal trials involving serious offenses.

many such components of basic due process have yet to emerge." Teague, 489 U.S. at 313; see also Saffle, 494 U.S. at 495; Butler v. McKellar, 494 U.S. 407, 415 (1990); O'Dell v. Netherland, 521 U.S. 151, 170 (1997). The Court has further underscored the narrowness of the second Teague exception by its actions. Beginning with Teague in 1989, the Court has examined numerous new rules of law against the second exception and found that none of them fit within its narrow confines. See, e.g., Teague, 489 U.S. at 307; Caspari, 510 U.S. at 396; Graham v. Collins, 506 U.S. 461, 478 (1993); Sawyer, 497 U.S. at 242; Saffle, 494 U.S. at 495; Butler, 494 U.S. at 416.

Mindful of the narrow confines of the second Teague exception, the court finds that Ring neither improves accuracy of trial nor alters our understanding of the bedrock procedural elements essential to the fairness of a proceeding. Ring merely shifted the ultimate fact-finding responsibility as to existence of aggravating circumstances in the capital crime context from the judge to the jury. This shift does not enhance the likelihood of an accurate sentencing result. Indeed, the Supreme Court has recognized that judges are unbiased and honest. See Withrow v. Larkin, 421 U.S. 35, 47 (1975). Additionally, the Delaware Death Penalty Statute required a two-phase approach wherein the jury offered a recommendation to the judge as to both the aggravating factors and the sentence. The jury's recommendation likely served as a check for the judge, thereby

lending somewhat of a safeguard to the sentencing process. Furthermore, accuracy is not readily measurable with respect to the existence of aggravating circumstances. The Delaware Death Penalty Statute provided for some aggravators that may be characterized as objective, like those implicated in the facts at bar, and others that very clearly are subjective, such as whether "the murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, use of an explosive device or poison or the defendant used such means on the victim prior to murdering the victim" and whether "the murder was premeditated and the result of substantial planning." See 11 Del. C. § 4209 (e)(1)(l) and (u). While a reviewing court could attempt to measure the accurate determination of the objective aggravators, there would be no way for a reviewing court to measure the accurate determination of the subjective aggravators. The court, therefore, concludes that petitioner cannot meet the first requirement necessary to avail the second Teague exception.

Turning to consider the second requirement, every federal appellate court that has considered Apprendi under Teague's second exception has concluded that it did not represent a watershed rule of criminal procedure. See Sepulveda, 330 F.3d at 59-63 (1st Cir. 2003); Coleman, 329 F.3d at 88-90 (2d Cir. 2003); Swinton, 333 F.3d 481, 489-91 (3d Cir. 2003); Sanders, 247 F.3d at 148-51 (4th Cir.); United States v. Brown, 305 F.3d 304, 309-10 (5th Cir. 2002); Regalado v. United States, 334 F.3d 520, 526-

27 (6th Cir. 2003); Curtis, 294 F.3d at 843-44 (7th Cir. 2002); United States v. Moss, 252 F.3d 993, 998-1001 (8th Cir. 2001); United States v. Sanchez-Cervantes, 282 F.3d 664, 669-70 (9th Cir. 2002); United States v. Mora, 293 F.3d 1213, 1218-19 (10th Cir.); McCoy v. United States, 266 F.3d 1254, 1255-58 & n.16 (11th Cir. 2001). Several state appellate courts have also held that Apprendi did not announce a watershed rule. See People v. Bradbury, 68 P.3d 494, 496-97 (Colo. App. 2002); Figarola v. State, 841 So.2d 576, 577 (Fla. App. 2003); People v. Gholston, 772 N.E.2d 880, 886-88 (Ill. App. 2002); Whisler v. State, 36 P.3d 290, 300 (Kan. 2001); Meemken v. State, 662 N.W.2d 146, 149-50 (Minn. App. 2003); Teague v. Palmateer, 57 P.3d 176, 183-87 (Ore. App. 2002). While the court recognizes that the nature of the crimes underlying the Apprendi and Ring decisions differ, the court, nonetheless, finds that Ring, as an extension of Apprendi, is not a watershed rule. The court notes that select appellate courts have reached the same conclusion. See Turner, 339 F.3d at 1285-86 (11th Cir. 2003); Head v. Hill, 587 S.E.2d 613, 619 (Ga. 2003); State v. Lotter, 664 N.W.2d 892, 905-08 (Neb. 2003); Colwell, 59 P.3d at 473 (Nev. 2002); State v. Towery, 64 P.3d 828 (Ariz. 2003). Unlike the Supreme Court prototype case, Gideon, where the fundamental fairness of an indigent's trial was necessarily impacted by whether he was able to avail the assistance of counsel, Ring does not implicate the same fairness concerns. That is, there is no reason to believe that an

impartial jury would reach a more accurate conclusion regarding the presence of aggravating circumstances than an impartial judge. Indeed, the Supreme Court explained in Ring that "the Sixth Amendment jury trial right . . . does not turn on the relative rationality, fairness, or efficiency of potential factfinders." Ring, 536 U.S. at 607.

Moreover, Supreme Court precedent substantiates the conclusion that Ring does not constitute a watershed rule. The Supreme Court declined to make Duncan v. Louisiana, 391 U.S. 145 (1968), which applied the Sixth Amendment's jury trial guarantee to the states through the Fourteenth Amendment, retroactive. DeStefano v. Woods, 392 U.S. 631, 633 (1968). The Supreme Court held that Duncan "should receive only prospective application." Id. Even though the DeStefano decision preceded Teague, the Supreme Court's reasoning is still relevant. The Supreme Court stated, "We would not assert, however, that every criminal trial - or any particular trial - held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury." Id. at 634-35 (quoting Duncan, 391 U.S. at 158). For these reasons, the court concludes that Ring fails to meet the second requirement of the second Teague exception. Accordingly, the court holds that the new rule of criminal

procedure embodied in Ring does not apply retroactively on collateral review.[36]

d. Ring v. Arizona: A New Rule of Substantive Criminal Law In Delaware

In the alternative, the court will consider the potential substantive effect of Ring on Delaware criminal law. The Supreme Court observed in Ring that the Delaware Death Penalty Statute, similar to the death penalty laws in place in Florida, Alabama, and Indiana, created a hybrid system wherein the jury renders an advisory verdict and the judge makes the ultimate sentencing determination. See id. at 608. The Eleventh Circuit has analyzed the substantive impact of Ring on Florida's analogous hybrid system in the Turner decision. See Turner, 339 F.3d at 1279-1286. This court, consequently, carefully considers that decision in addressing Delaware's hybrid system under Ring. The court agrees with the Eleventh Circuit that Ring neither impacts the types of aggravating factors that must be shown under the hybrid scheme to elevate the sentence from life imprisonment to death nor changes the State's burden to establish those factors beyond a reasonable doubt. See id. at 1284. On this basis, the Eleventh Circuit concluded that Ring is not a substantive decision as to Florida criminal law, stating "Ring altered only

[36]In her dissent in Ring, Justice O'Connor observed that prisoners "will be barred from taking advantage of [Ring's] holding on federal collateral review." Ring, 536 U.S. at 621 (citing 28 U.S.C. 22449b)(2)(A), 2254(d)(1) and Teague, 489 U.S. 288)).

who decides whether any aggregating circumstances exist and, thus, altered only the fact-finding procedure." Id.

Although the court readily concurs with this conclusion, the court recognizes that the impact of Ring on Delaware criminal law may not be restricted to procedure alone, but may entail substantive implications as well. A defendant found guilty of first-degree murder under the Delaware Death Penalty Statute was not automatically sentenced to death as noted above. Rather, the jury was required to recommend to the judge whether the aggravating circumstances outweighed the mitigating circumstances by a preponderance of the evidence. The judge, in turn, was required to make this same determination. Thus, in practical effect, Delaware's aggravating circumstances may be viewed as operating as statutory elements of the offense of capital murder, distinguishable from the offense of non-capital murder under Delaware law. From this vantage, the court concludes that Ring modified substantive criminal law in Delaware by establishing two distinct crimes, to wit, capital murder with aggravating circumstances as elements and non-capital murder. The court notes that the Ninth Circuit reached the same conclusion when considering the effect of Ring on Arizona criminal law. See Summerlin, 341 F.3d at 1101-1108. The Ninth Circuit opined that Ring restored the pre-Walton structure of capital murder law in Arizona. Id. at 1105. The Ninth Circuit relied on Sattazahn v. Pennsylvania, 537 U.S. 101 (2003), for support. Writing for the

majority in Sattazahn, Justice Scalia stated: "Put simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact - no matter how the State labels it - constitutes an element, and must be found by a jury beyond a reasonable doubt." Id. (quoting Sattazahn, 537 U.S. at 111). Thus, the Ninth Circuit found that "there is a distinct offense of capital murder, and the aggravating circumstances that must be proven to a jury in order to impose a death sentence are elements of that distinct capital offense." Summerlin, 341 F.3d at 1105(citing Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)).

The court further notes that the substantive effect of Ring on Delaware law is substantiated by the fact that the General Assembly of the State of Delaware amended the Death Penalty Statute in 2002 in response to Ring (the "2002 Statute"). See Brice, 815 A.2d at 320 (citing 73 Del. Laws c. 423 (2002), S.B. 449). "The 2002 Statute transformed the jury's role, at the so-called narrowing phase, from one that was advisory under the 1991 version of Section 4209 into one that is now determinative as to the existence of any statutory aggravating circumstance." Id. This amendment, therefore, prevents a court from imposing a death sentence unless a jury first determines unanimously and beyond a reasonable doubt that at least one statutory aggravating circumstance exists. Id. (citing S.B. 449, Synopsis) Therefore,

the court concludes that Ring has a substantive impact on Delaware criminal law.

e. Harmless Error

Before ruling that Ring should be retroactively applied to petitioner's case, the court shall consider whether the instant Ring error meets the standard for harmless error. "[T]he United States long ago through its Congress established for its courts the rule that judgments shall not be reversed for 'errors or defects which do not affect the substantial rights of the parties.'" Chapman v. California, 386 U.S. 18, 22 (1967). In Chapman, the Supreme Court found that there are "some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring automatic reversal." Id. In so holding, the Supreme Court presented a two-step analysis for an appellate court dealing with a constitutional error to use on direct review. First, the court must determine if the error falls into the category of violations subject to the federal harmless constitutional error rule or if the error instead falls into the category of errors requiring automatic reversal. Second, if the federal harmless constitutional error rule is applicable, then the court must determine the impact of the error under this rule. To this end, the Supreme Court held that "before a federal constitutional error can be held harmless, the court must be able to declare a

belief that it was harmless beyond a reasonable doubt." Id. at 23.

In Arizona v. Fulminante, 499 U.S. 279, 310 (1991), the Supreme Court characterized those errors placed in the automatic reversal category as involving "structural defect[s] affecting the framework within which the trial proceeds rather than simply an error in the trial process itself." Structural defects are "defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." Id. at 309. In contrast, a trial error is an "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." Id. at 307-08. The Supreme Court has observed that structural errors have been found in a "very limited class of cases." See Johnson v. United States, 520 U.S. 461 (1997) (citing structural errors for (1) Gideon (a total deprivation of the right to counsel); (2) Tumey v. Ohio, 273 U.S. 510 (1927)(lack of an impartial trial judge); (3) Vasquez v. Hillery, 474 U.S. 254 (1986)(unlawful exclusion of grand jurors on the basis of race); (4) McKaskle v. Wiggins, 465 U.S. 168 (1984)(denial of the right to self-representation at trial); (5) Waller v. Georgia, 467 U.S. 39 (1984)(denial of the right to a public trial); and (6) Sullivan v. Louisiana, 508 U.S. 275 (1993) (an erroneous reasonable doubt instruction to the jury)).

Since Chapman, the Supreme Court has ruled that the "harmless beyond a reasonable doubt" standard is not applicable in the context of habeas corpus proceedings, as contrasted with direct review. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993). In its place, the Supreme Court adopted the standard announced in Kotteakos v. United States, 328 U.S. 750 (1946), which focuses on whether the error "had substantial and injurious effect or influence in determining the jury's verdict." Id. (quoting Kotteakos, 328 U.S. at 776). Under this standard, a habeas petitioner may obtain collateral review of his constitutional claims, but is not entitled to habeas relief based on trial error unless he can establish that it resulted in "actual prejudice." Brecht, 328 U.S. at 637 (citing United States v. Lane, 474 U.S. 438, 449 (1986)). The court reasoned that

> [o]verturning final and presumptively correct convictions on collateral review because the State cannot prove that an error is harmless under Chapman undermines the States' interest in finality and infringes upon their sovereignty over criminal matters. Moreover, granting habeas relief merely because there is a "'reasonable possibility'" that trial error contributed to the verdict, . . . is at odds with the historic meaning of habeas corpus -- to afford relief to those whom society has "grievously wronged." Retrying defendants whose convictions are set aside also imposes significant "social costs," including the expenditure of additional time and resources for all the parties involved, the "erosion of memory" and "dispersion of witnesses" that accompany the passage of time and make obtaining convictions on retrial more difficult, and the frustration of "society's interest in the prompt administration of justice."

Brecht, 507 U.S. at 637 (internal citations and quotations omitted).

As the first step in a Chapman analysis, the court finds evident from a comparison of the constitutional violations held subject to harmless error with those held subject to automatic reversal, that the instant Ring error fits in the former category. Unlike a defect such as the complete deprivation of counsel or trial before a biased judge, a Ring error does not affect the framework within which the trial proceeds, but rather only the trial process itself. Indeed, the Supreme Court observed that "while there are some errors to which Chapman does not apply, they are the exception and not the rule.. . . [I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." Rose v. Clark, 478 U.S. 570, 578 (1986).

Moreover, a Ring error is similar in both degree and kind to a failure to submit an element of a crime to the jury. The Supreme Court has considered this type of failure under the harmless error standard. In Johnson, the trial judge decided the issue of materiality in a perjury prosecution, rather than submit this element to the jury. The Supreme Court recognized that improperly omitting an element from the jury can "easily be analogized to improperly instructing the jury on an element of the offense, an error which is subject to the harmless error

analysis." Johnson, 520 U.S. at 469. Similarly, in Neder v. United States, 527 U.S. 1 (1999), the defendant was prosecuted for tax fraud, mail fraud, bank fraud, and wire fraud. The trial court instructed the jury that it need not consider the materiality of any false statement, even though materiality is an element of both tax fraud and bank fraud. The Supreme Court recognized that the judge's failure to instruct and submit the element of materiality to the jury violated the Sixth Amendment. Id. at 9. Nevertheless, the Supreme Court held that the error did not result in a structural error subject to automatic reversal because it did "not necessarily render [the] criminal trial fundamentally unfair." Id.

Under a harmless error analysis in the context of a habeas proceeding, the court finds that petitioner cannot establish actual prejudice to satisfy Brecht. As discussed above when considering prejudice under the procedural bar doctrine, the judge could not have reached a different conclusion than the jury regarding the existence of the aggravating circumstances beyond a reasonable doubt because the particular aggravators at bar are of an objective nature. See *infra*, Section IV, E, 1. Therefore, the court concludes that the Ring error at bar was harmless and that petitioner is not entitled to have his case remanded to the state for a re-sentencing hearing.[37]

[37]Justice O'Connor opined in her dissent in Ring that "prisoners will be unable to satisfy the standards of harmless

V. CONCLUSION

For the reasons stated, the court denies petitioner's amended application for writ of habeas corpus. A certificate of probable excuse for an appeal is ordered, and the stay of execution imposed by this court on February 17, 200o will be continued pending appellate review by the Court of Appeals for the Third Circuit. An order shall issue.

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error or plain error review." Ring, 536 U.S. at 621.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

STEVEN SHELTON,	)	
	)	
	)	
Petitioner,	)	
	)	
v.	)	Civ. No. 00-78-SLR
	)	
ROBERT E. SNYDER ,	)	
	)	
Respondent.	)	
	)	

O R D E R

At Wilmington, this 31st day of March, 2004, consistent with the opinion issued this same day;

IT IS ORDERED that:

1. Petitioner's amended application for habeas corpus relief is denied. (D.I. 3, 33)

2. The Clerk of Court shall issue a certificate of probable excuse for an appeal to the Court of Appeals for the Third Circuit.

3. The stay of execution imposed by the court on February 17, 2000 is continued pending appellate review by the Court of Appeals for the Third Circuit.

Sue L. Robinson
United States District Judge